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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF WISCONSIN,

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

FREDERIC K. CONOVER,
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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME.

HARLOW S. ORTON,
Ex officio CHIEF JUSTICE.
JOHN B. CASSODAY,
JOHN B. WINSLOW,
SILAS U. PINNEY,
ALFRED W. NEWMAN.

Attorney General, - JAMES L. O'CONNOR.

Clerk, - - - CLARENCE KELLOGG.

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MEMORANDUM.

ORTON, C. J., took no part in the decision of the following cases reported in this volume:

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ERRORS NOTED IN PREVIOUS VOLUMES.

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Page 688, line —7. For was, read was not.

VOL. 81.

Page 317, line 15. For 16 Wis. 264, read 16 Wis. 247.
Page 475, line 22. For 11 Wis. 34, read 11 Wis. 35.
Same corrections in table of cases cited, to which also add:
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CASES DETERMINED

AT THE

January Term, 1894.

THE STATE vs. ATKINSON.

April 16 — May 1, 1894.

Arson: Burning of dwelling house: Variance.

The burning of a dwelling house, under sec. 4399 or sec. 4400, R. S., and the burning of a building, under sec. 4402, are separate and distinct offenses, neither including the other; and upon an information charging the burning of a building there can be no conviction if it was a dwelling house that was burned.

REPORTED from the Circuit Court for *Dane* County.

Arson. Defendant was tried upon an information charging him with feloniously burning "a certain building, to wit, a hotel there situate," etc. The undisputed evidence showed that the building named in the information was at the time of the fire used as an hotel, and continuously occupied by the lessee, his wife and family and help, as a dwelling. At the close of the testimony the defendant moved that a verdict of acquittal be directed, which was refused. A verdict of guilty being rendered, a motion for a new trial was made, because the "evidence wholly fails to prove the offense charged in the information, and proves a different offense, if any." The circuit judge, with the defendant's consent, reports the foregoing facts to this court, and submits for determination two questions: *First.* Should

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the motion for a new trial be granted? *Second.* Should the court proceed to pronounce sentence upon the defendant pursuant to sec. 4402, R. S.?

For the plaintiff there was a brief by the *Attorney General* and *J. M. Clancey*, Assistant Attorney General, and oral argument by *Mr. Clancey*. They cited *Clark v. State*, 69 Wis. 203; *Selkirk v. Cobb*, 13 Gray, 313; Anderson, Law Dict. 139; *Comm. v. Smith*, 151 Mass. 491; *Comm. v. Hayden*, 150 id. 332.

For the defendant there were briefs by *Luse & Wait*, and oral argument by *L. K. Luse*. They argued, *inter alia*, that the crimes defined by secs. 4399, 4400, 4401, 4402, were separate and distinct offenses and not different degrees of the same crime, and a description which places an offense under one section necessarily excludes it from the operation of any other section. *Comm. v. Hayden*, 150 Mass. 332; *People v. Handley*, 93 Mich. 46; *Moore v. People*, 47 id. 639; *People v. Calderwood*, 66 id. 92; *People v. Griffin*, 77 id. 585; *Fairchild v. People*, 48 id. 31; *Williams v. State*, 46 Ga. 212; *Bravo v. State*, 20 Tex. App. 188; *Guynes v. State*, 25 id. 584; *Dedieu v. People*, 22 N. Y. 178; *Giskie v. State*, 71 Wis. 612.

Winslow, J. The building burned was proven to be a dwelling house, therefore the legal question presented is whether the offense of burning a dwelling house is included within the provisions of sec. 4402, R. S. We are decidedly of the opinion that it is not so included.

Four sections of the Revised Statutes define and prescribe punishment for all felonious burning of buildings, viz., secs. 4399, 4400, 4401, and 4402. They are manifestly intended to complement each other and form an harmonious and consistent code upon the subject. They must be construed together, and attention must be paid to the whole and every part of the law, its subject matter, its

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effects and consequences, its reason and spirit, and the apparent intention to be derived from the whole law; and, further, the several provisions must be construed so as to make all parts harmonize if possible. *Harrington v. Smith*, 28 Wis. 43; *Palms v. Shawano Co.* 61 Wis. 211.

Bearing this rule in mind, an examination of the sections above mentioned convinces us that it was never designed that the felonious burning of a dwelling house should be prosecuted and punished under sec. 4402. Secs. 4399 and 4400 are directed specially and exclusively against felonious burnings of dwelling houses. They are manifestly intended to cover all offenses of this nature against the habitation of men, whether in the night time or in the day time. Sec. 4399 covers all burnings of dwelling houses in the night time, and the punishment is fixed at not more than fourteen years' nor less than seven years' imprisonment, except that in case no person was lawfully in the building at the time of the offense the minimum imprisonment may be three years. Sec. 4400 covers all burnings of dwelling houses in the day time, and the burning of any building in the day time by which a dwelling is burned in the night time; and the punishment is fixed at not less than three nor more than ten years' imprisonment. Here the consideration of offenses against the dwelling house or habitation ceases. All such offenses seem to have been considered fully covered, and attention is then turned in sec. 4401 to several classes of buildings or structures which are not dwelling houses, but still are of considerable importance. These classes are: (1) Public buildings, such as churches, courthouses, colleges, jails, etc.; (2) steamboats and vessels; (3) banking houses, stores, warehouses, and factories; (4) barns, shops, or offices within the curtilage of a dwelling house or other building by the burning of which any building named in the section is destroyed. Burnings under this section, if in the night time, are punished by imprison-

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ment not less than five nor more than fifteen years, and if in the day time not less than four nor more than eight years. Then comes sec. 4402, which seems very plainly to be in the nature of a catchall to cover cases not previously covered. It provides as follows: "Any person who shall wilfully and maliciously burn, either in the night time or day time, any building whatsoever of another, or of which he is lessee or tenant, other than is mentioned in the last preceding section, or any bridge, lock, dam, or flume, shall be punished by imprisonment in the state prison not more than eight years nor less than four years."

It is argued on behalf of the state that this last-named section covers by its terms "any building whatsoever of another" the burning of which is not punishable under sec. 4401; that a dwelling house is a building, and that its burning is not punishable under sec. 4401, and consequently it is included within the terms of sec. 4402. If this contention be well founded, we have, then, two sections of the statute prescribing different punishments for the same offense. Confusion is at once introduced into the law of arson. In case of the felonious burning of an occupied dwelling house in the night time, it will be practically within the power of the prosecuting officer to say: "Although the statute provides a minimum imprisonment of seven years for such an offense, with a possible fifteen years, I will prosecute under sec. 4402, and thus render it possible that the imprisonment may be four years only, and cannot be more than eight years." Was such a result intended? When the legislature so carefully defined the different kinds of arson as to dwellings and fixed varying punishments therefor, can it be possible that they intended that all such offenses might be prosecuted under another section, which was manifestly framed to cover possible omissions, and which prescribes a different penalty? We cannot think so. The difference between the offenses is

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not one of degree, but they are distinct and separate offenses. It has been repeatedly held, under similar statutes that under an indictment for burning a dwelling house the proof must show that the building burned was a dwelling house, and that the defendant could not be convicted of burning a building not a dwelling house. *People v. Handley*, 93 Mich. 46; *Comm. v. Hayden*, 150 Mass. 332. The reason given is that the two offenses are separate and distinct offenses. The description of what was burned is essential to fix the identity of the offense. The one is an offense against the habitation and the other against the fee title. If the two offenses are different and distinct, and the description of the building essential to fix the separate identity of each, it is difficult to see why the converse of the rule stated in the cases does not apply here. The information charges the burning of a building under sec. 4402. The evidence shows the burning of a dwelling house, which constitutes a different and distinct offense. One offense has been charged, and a different offense proven. How can the conviction be maintained?

It was said in *Comm. v. Hayden* that the statutory offense of burning a dwelling house does not include within itself the burning of a building which is not a dwelling house. With equal truth it may be said that the charge of burning a building does not necessarily include within itself the offense of burning a dwelling house. It is not a case of a higher and lesser offense. The offense charged in the information does not include the elements of the other, nor do the averments of the information contain any sufficient charge of the burning of a dwelling house. *Kilkelly v. State*, 43 Wis. 604; *State v. Yanta*, 71 Wis. 669.

An opinion contrary to the view we have taken was expressed by the supreme court of Massachusetts in *Comm. v. Smith*, 151 Mass. 491. Examination of the case shows that this question was not involved in the case. The question

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there was whether an indictment which alleged the burning of "a certain building, to wit, a house of one Carter," charged the burning of "a dwelling house," under sec. 1 of the Public Statutes, ch. 203, or the burning of a "building," under sec. 4 of that chapter. The statutes are similar to our own, and the court held that the indictment charged only the burning of a building. The court then intimates that an indictment charging the burning of a "building" might be sustained by proof of the burning of a dwelling house, and it is said that it is no defense to an indictment that the facts in proof show that the defendant committed an offense of a higher degree than that charged. The court here seems to have fallen inadvertently into the error that the two offenses differ only in degree, whereas in fact they are separate and distinct, and neither included within the other.

There is authority, as we have seen, from a deservedly eminent court, for the position taken by the state. The question is certainly a delicate one, and one upon which good lawyers might easily differ in opinion; but, after what we believe to be full and mature consideration, we have reached the conclusions hereinabove expressed, and believe them to be sound law. The first question propounded, namely, Should the motion for a new trial be granted? must be answered in the affirmative. This renders it unnecessary to answer the second question.

By the Court.—It is so ordered.

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GILLAN, Appellant, vs. THE BOARD OF REGENTS OF NORMAL SCHOOLS, Respondent.

April 17 — May 1, 1894.

Normal schools: Power of regents to remove teacher "at pleasure:" Contracts.

1. The power to remove a teacher "at pleasure," given to the board of regents of normal schools by subd. 3, sec. 404, R. S., is a discretionary one, and its exercise in a given case cannot be inquired into by the courts.
2. The statute giving such power of removal becomes a part of every contract made by the board with a teacher for his employment in a normal school; and the board can make no by-law or contract by which such power is bargained away, limited, or restricted.
3. When by the exercise of such power the contract relation between a teacher and the board is terminated, and he has received notice thereof, his right to any further salary or compensation is also terminated.

APPEAL from the Circuit Court for *Dane* County.

The facts are sufficiently stated in the opinion. The plaintiff appeals from the judgment.

For the appellant there was a brief by *Williams & Robinson*, attorneys, and *Geo. W. Bird*, of counsel, and oral argument by *O. T. Williams*. They contended, *inter alia*, that the board had the right to make any contract of hiring with a teacher that it saw fit. The statute gives the greatest discretion in this regard, and does not direct that contracts *shall* contain a condition that the teacher shall be subject to removal at pleasure. Nor does the provision that the board may remove at pleasure engraft that condition upon every contract. It simply gives the board the *right* to make such a reservation in the contract. Without such express authority, the board could not insert such a provision in any contract with a teacher. *Tripp v. School District*, 50 Wis. 651. A teacher is not a public

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officer, but is an *employee* of the board, and his relation with the board is governed entirely by the contract of hiring, if that contract is a legal one. He cannot be legislated out of office, nor can his salary be diminished, nor can he be removed without just cause, during the term of the contract, unless there is an express stipulation in his contract to that effect. *Butler v. Regents*, 32 Wis. 124.

For the respondent there was a brief by *R. M. Bashford* and *T. A. Polleys*, and oral argument by *Mr. Bashford*. To the point that, the power of summary removal vested in the board being discretionary, the manner in which such power was exercised cannot be inquired into by the courts, they cited, besides cases cited in the opinion, *People ex rel. Stevenson v. Higgins*, 15 Ill. 110; *Territory v. Cox*, 6 Dak. 501.

ORTON, C. J. By the complaint in this action the plaintiff's claim is predicated upon a contract with the defendant board for his services as a teacher in the normal school in the city of Milwaukee, and as a conductor of institutes for the instruction of teachers in various parts of the state, for the school year commencing on the 1st day of September, 1891, and ending on the 24th day of June, 1892, for the sum of $2,000 per school year, payable in monthly instalments, as teacher in said normal school, and for $50 per week and all traveling expenses as such conductor of institutes. The plaintiff entered upon the performance of said contract about the 1st day of September, 1891, and continued to render services thereunder, in a satisfactory manner, up to the 18th day of April, 1892, when he was wrongfully discharged from such employment, without cause or excuse. The plaintiff has been ready and willing at all times to perform all the conditions and requirements of his said contract, but the defendant on said 18th day of April, 1892, refused to allow him to do so, or to pay him

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therefor. Plaintiff demands judgment for the balance of his compensation as conductor of institutes, and for the balance of his salary for the full school year ending the 24th day of June, 1892, in the gross sum of $791.68, with interest and costs.

The answer is, in effect, as follows: The defendant board was authorized by law to make rules, regulations, and by-laws for the government and management of normal schools; to employ teachers therein, prescribe their duties, and fix their salaries, and to remove any teacher so employed, *at pleasure.* The state superintendent of public instruction, with the advice and consent of said board, was authorized to make such rules and regulations as they deemed proper for the government of said institutes, designate the counties in which they shall be held, and to employ agents to perform the work in connection therewith. The board had adopted a rule, which was in force September 1, 1891, requiring all persons employed in the normal schools to enter into a written contract with the board in such form as the board may prescribe. At the date aforesaid the plaintiff knew that said board had used a form of such contract, and that it had not been changed, that provided that such contract might be terminated by either party by giving the other party thirty days' notice thereof. Any contract made between the plaintiff and the board was subject to said terms and conditions and the provisions of law. The plaintiff had been employed as teacher in said normal school, and conductor, up to the aforesaid date, on said terms and conditions, and at a salary of $2,000 per school year, payable in monthly instalments, and $50 per week and traveling expenses as conductor of institutes; and he continued in said employment for the school year commencing September 1, 1891, and ending the 24th day of June, 1892, on the same terms and conditions. During said school year, and prior to March 16, 1892, there was a

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contention between the president and the professors and students of said normal school, and the plaintiff had become so involved therein as to impair his usefulness as a teacher in said school. The board therefore deemed it advisable that the plaintiff should be removed from his position as teacher in said school, and at a meeting of said board, held in conformity to law on the 16th day of March, 1892, at its office at Madison, said board adopted a resolution that the secretary of said board give a written notice to Prof. *S. Y. Gillan* that his services as a teacher in the Milwaukee Normal School, and institute conductor, be terminated at the end of thirty days thereafter, and that his services as an employee of the board end in thirty days from his receipt of said notice. The plaintiff acknowledged the receipt of said notice on the 18th day of March, 1892. The services of the plaintiff as such teacher and conductor ended, therefore, on the 18th day of April, 1892, and said contract of employment was dissolved and terminated at said date, and since then the plaintiff has not been an employee of said board. The board, on the 25th day of March, 1892, paid the plaintiff $150 on the pay roll of that month, and on or before 15th day of July thereafter the board tendered to the plaintiff the further sum of $141.68, as the balance of his compensation as teacher and conductor, and for expenses, which the plaintiff refused to receive; and the board has tendered the plaintiff the sum of $324.06 in all, including costs, and has paid the money into court.

For this last-named sum the plaintiff obtained judgment. The action was dismissed, so far as the plaintiff sought to recover any salary or compensation for the school year subsequent to the 18th day of April, 1892. The facts stated in the answer, and the amounts tendered the plaintiff, appear to leave nothing at issue, except the plaintiff's claim of $641 as the balance of his salary up to the end of

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the school year,— June 24, 1892. That question depends upon the right of the board to terminate the contract on the 18th day of April, 1892, at its mere pleasure or discretion, and that is the only question on this appeal.

The parties do not differ, so far as the contract is for the school year at the salary of $2,000 per year, payable in monthly instalments. The court does not find that the contract between the plaintiff and the board gave either party the right to terminate it on thirty days' notice. But the court seems to predicate the right of the board to terminate the contract at pleasure entirely on the statute, which became a part of and governs it. The appellant ought not to be so very particular and critical as to the legality of the meeting of the board which resolved to notify him that his contract was terminated, when the contract itself had its inception in a very informal, if any, action of the board; and the existence of any special contract for the year commencing September 1, 1891, depends upon mere inference, presumption, or implication from the fact that he had such a contract the year before. The board met, and so resolved, and its secretary served the notice of it upon the plaintiff. That was sufficient at least to terminate such a questionable special contract. If there was a hiring of the plaintiff for any certain time, it is implied, rather than expressed.

Sec. 404, R. S., provides that "the said board shall have the government and control of all the normal schools and *shall have power* to appoint a principal and assistants and such other teachers and officers, and to employ such persons, as may be required for each of said schools; to fix the salary of each person so appointed or employed, and to prescribe their several duties." Subd. 2. "To *remove at pleasure* any principal, assistant, or other officer or person from any office or employment in connection with any such school." Subd. 3. This statute the court below held.

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and the learned counsel of the respondent contends, gave the *Board of Regents of Normal Schools* the power to remove the plaintiff from his employment as a teacher of the Milwaukee Normal School, as they attempted to do, April 18, 1892. The learned counsel of the appellant contends that the contract under which the plaintiff was employed contained no such provision, and that the statute does not compel the board to remove teachers without assigning any cause, and that one of the by-laws of the board requires the committee to make formal written contracts with teachers, and such contracts do not contain any such provision.

This power was wisely given to the board. An emergency might arise when the continuance of an objectionable teacher, even for a day, in his employment might be very injurious to the school. The trial of a teacher in a normal school on charges of misconduct, with its delays and publicity and the excitement it would produce and the feelings it would engender, would be very injurious to the school; and it would most likely make heated partisans of the other teachers and the scholars in the contest, and the evil consequences would be great, if not endless. There is no other way in which the character of the teacher could be saved, except by silent removal. An evil-disposed and perverse teacher might prefer to have charges against him made public, and to rally his forces of teachers and scholars and outside friends, and have a fight and battle with the board, no matter how much the school might be injured by it. It is at least doubtful whether the board could set on foot a trial of charges against a teacher of a normal school, with a view of merely removing him. It would seem to defeat the wise purpose the legislature had in view in giving the board this power of removal *at pleasure*. The question is not whether the board is bound to exercise this power in all cases, but whether, in case they do remove a

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teacher summarily, the courts could interfere with the exercise of their discretion or reverse their action.

1. This power of summary removal of a teacher, vested in the board by statute, is a discretionary power, and its exercise in a given case cannot be inquired into or questioned by the courts. *Attorney General ex rel. Taylor v. Brown*, 1 Wis. 513; *State ex rel. Gill v. Watertown*, 9 Wis. 254; *State ex rel. Kennedy v. McGarry*, 21 Wis. 496; *State ex rel. Danforth v. Kuehn*, 34 Wis. 229; *State ex rel. Willis v. Prince*, 45 Wis. 610; *Queen v. Darlington School*, 6 Q. B. 682; *In re Hennen*, 13 Pet. 230; *State ex rel. Att'y Gen. v. Hawkins*, 44 Ohio St. 98.

2. This statute that gives the board the power of removal of all teachers at pleasure becomes a part of every contract the board makes with a teacher for his employment in a normal school. This is an old and incontestable principle of the law of contracts. Bish. Cont. sec. 439, and cases cited. In *Head v. University*, 19 Wall. 530, the court said, in relation to the employment of a professor in the Missouri University: "That he and his office and *contract* were subject to the laws in existence at the time of making it was sufficiently evident, without any declaration on the point."

3. The board of regents could make no by-law or contract by which this power could be bargained away, limited, or restricted. *Lauenstein v. Fond du Lac*, 28 Wis. 336; Beach, Pub. Corp. secs. 268, 269, 471; Dill. Mun. Corp. secs. 96, 97; *Brimmer v. Boston*, 102 Mass. 19; *Boylston Market Ass'n v. Boston*, 113 Mass. 528; *Queen v. Darlington School*, 6 Q. B. 682. This last case is much in point. The letters patent gave the governors of the Darlington School, established by a charter of Queen Elizabeth, the power to remove a teacher or school master "*according to their sound discretion.*" The case was of a *mandamus* to restore a teacher who had been removed without charges.

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The governors had made a by-law by which teachers were to be removed on charges, and the teacher to be heard in his defense. Lord DENMAN held that "the discretionary power given by the letters patent was fatal to the validity of the by-law." That "the governors, when they undertook to govern the school in the manner required by the charter, accepted a larger trust and a wider duty. They are bound to remove a master who, according to their *sound discretion*, they think unfit for the place. The power of the governors to remove justifies their doing so, and it is not to be restricted by any opinion we may have of the reasons on which they might have been induced to exert it." The doctrine of that case has never been repudiated or questioned. It is sound in reason as well as in law. When such a discretionary power has been exercised, it can no more be questioned than the statute itself.

4. After the plaintiff had been removed, and the contract relation between himself and the board terminated, and notice thereof received by him, his right to any further salary or compensation, as a matter of course, is also terminated. Beach, Pub. Corp. sec. 168 *et seq.; Eckloff v. District of Columbia*, 135 U. S. 240; *Langdon v. New York*, 92 N. Y. 427; *Gillespie v. New York*, 6 Daly, 286; *Gregory v. New York*, 113 N. Y. 416. The contract of the plaintiff with the board was not for any certain time, but to continue only so long as the board may not exercise this statutory power of removal. The statute became a condition of his contract, as much as if it was written in it, that the board might remove him *at pleasure*. He accepted the employment with knowledge of the law on this condition of his contract, and he has no reason to complain of it.

These principles appear to be unquestionable. The learned counsel has cited no case in contradiction of them. The cases he cites are those in which no notice of the termination of the employment had been given. In *Butler v.*

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Regents, 32 Wis. 124, the regents did not exercise the power of removal, and there was no such question in the case. In *Tripp v. School Dist.* 50 Wis. 651, this court held, in effect, that the termination of the services of the teacher was not authorized by the statute. If the exercise of this discretionary power conferred on the board by the statute is not effectual to remove a teacher in the normal schools and terminate his wages, then the statute is nugatory and has no force whatever, and it had better be repealed. We can come to no other conclusion than that of the circuit court,—that the plaintiff was entitled to no compensation or salary beyond the 18th day of April, 1892. The removal of the plaintiff is not questioned as an *abuse* of the discretion of the board.

This has been a very unfortunate controversy; but it is better that it has been in the courts, than before the board of regents of normal schools, on the trial of charges against the plaintiff, with the view of his removal for cause, and it has done far less harm to the plaintiff or the school. The plaintiff's competency and ability as a teacher have not been questioned, or his moral character assailed. He had unfortunately become embroiled in controversies which impaired his usefulness as a teacher, and threatened the success, peace, and harmony of the school. It was thought, no doubt, by the board, that his removal in this quiet way would promote the interests of the Milwaukee Normal School, and the board has not been charged with any other motive. This important case has been very ably presented by the learned counsel on both sides, and we have endeavored to give to it sufficient attention to arrive at a correct conclusion.

By the Court.— The judgment of the circuit court is affirmed.

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RIEMER, Respondent, vs. RICE, Appellant.

February 1 — May 25, 1894.

Written contract: Evidence of prior oral agreement: Real estate broker: Option to purchase: Commissions.

1. A written option to purchase land does not necessarily supersede a prior oral contract of agency between the same parties for the sale of the same land on commission, whether the option be regarded as an independent contract or merely as a writing to be used by the agent to show his authority to make a sale; and in either case the contract of agency may be shown by parol.
2. An agent to sell land, who was to receive as commission all that was realized on the sale exceeding $35,000, had also an option to purchase the land for $40,000. He produced a *bona fide* purchaser at $40,000, to whom the principal refused to convey, and he was obliged to take title to himself under his option in order to complete the sale. *Held*, that he was entitled to recover his commission.

APPEAL from the Circuit Court for *Waukesha* County.

Action to recover broker's commissions on sale of real estate. The plaintiff claimed that he was employed by defendant as broker to sell defendant's farm on Beaver Lake, Waukesha county, under a contract that the defendant was to receive $35,000 net, and plaintiff was to have, as his commissions, all that the farm brought exceeding $35,000. The defendant denied that he ever made any contract of this nature.

It appeared on the trial that negotiations were had between the parties on or about September 20, 1892. The character and effect of these negotiations were in dispute, the plaintiff claiming that they constituted an agency employment, as alleged by him in his complaint, and the defendant claiming that they were simply tentative conversations looking towards a purchase of the land by the plaintiff himself for $35,000. All of this testimony was objected to

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by the defendant, and exceptions duly taken to its admission.

The remaining facts were not substantially in dispute. These facts were as follows: On the 28th of September, 1892, the parties met, and the following option contract was made and signed by the parties, in consideration of $50 then paid by plaintiff, viz.:

"Be it known that I, *John A. Rice*, of Hartland, Waukesha county, state of Wisconsin, for and in consideration of fifty (50) dollars, hereby grant an option to *Gustav J. Riemer*, of Milwaukee, county of Milwaukee and state of Wisconsin, for sixty days from the 28th day of September, 1892, on the following described property, situated on Beaver Lake, in sections 21 and 28, township 8 north, range 18 east, in Waukesha county, state of Wisconsin, being 128 acres of land, more or less, the same being known as 'Interlachen Hotel,' upon payment of thirteen thousand ($13,000) dollars, to be paid on or before the 28th day of November, 1892; the balance of twenty-seven thousand ($27,000) dollars to be secured by a mortgage and note or notes bearing even date therewith, at the rate of five (5) per cent. per annum, payable annually, and payable on or before five years. The said *John A. Rice* further agrees to furnish to said *G. J. Riemer* an abstract of title up to the date of 28th day of November, 1892, showing the said described property free and clear of all incumbrances. He further agrees to sell to said *G. J. Riemer* the furniture, carpets, bedding, linen, chinaware, cutlery, and every other article pertaining to said hotel, excepting certain pieces of furniture to be retained by the said *John A. Rice*, the same to be appraised by appraisers, to be appointed as follows: The said *John A. Rice* to select one appraiser, another to be selected by *Gustav J. Riemer*, and these two so selected to select a third party,—which three appraisers are to be wholly disinterested parties. He further agrees to take a mortgage

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on said furniture and household utensils as part of the mortgage on the real property, the price of the furniture, etc., to be paid in with the first payment. He further agrees to sell to *G. J. Riemer* the grain, hay, and all farming implements, the same to be appraised on or before the 1st day of April, 1893, the appraisers to be appointed in the same manner as for the appraising of the furniture and household utensils. The said *G. J. Riemer* hereby agrees to let the said *John A. Rice* occupy the house known as the 'Interlachen Hotel' until the 1st day of April, 1893."

The plaintiff claimed that this option contract was executed simply for the purpose of assisting him in his negotiations for sale of the lands, and that it was not contemplated that he should himself become the purchaser; but the defendant claimed that it was the true and only contract between the parties.

After the execution of this option contract, a corporation was formed, through the efforts of the plaintiff, called the Beaver Lake Hotel & Land Company, and on the 26th day of November, 1892, said corporation offered, and was fully prepared, to purchase the land named in the option for $40,000, and to fulfill all the terms of the option; but defendant refused to make a conveyance to the corporation, whereupon the plaintiff, on the 28th day of November, 1892, paid the cash, amounting to $13,000, and executed the notes and mortgage, amounting to $27,000, called for by the contract, and received from defendant a deed of the property, which he immediately deeded over to the corporation.

There was a verdict for the plaintiff, with damages fixed at $5,000, and from judgment thereon defendant appeals.

James Douglas, for the appellant, contended, *inter alia*, that to admit parol evidence of a collateral matter two things are essential: (1) the writing must not on inspection be a complete contract; (2) the parol evidence must be

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consistent with and not contradictory of the written instrument. *Hei v. Heller*, 53 Wis. 415; *Engelhorn v. Reitlinger*, 122 N. Y. 76; *Thomas v. Scott*, 127 id. 133; *Smith v. Kemp*, 92 Mich. 357; *Fawkner v. Lew Smith W. P. Co.* 55 N. W. Rep. 200; *Taylor v. Davis*, 82 Wis. 455; Brown, Parol Ev. § 26; *Harrison v. McCormick*, 89 Cal. 327; *Kirch v. Davies*, 55 Wis. 299; *Merchants' & F. Nat. Bank v. McElwee*, 104 N. C. 305; *Moffitt v. Maness*, 102 id. 457.

For the respondent there was a brief by *Lyman G. Wheeler*, attorney, and *Chafin & Parkinson*, of counsel, and oral argument by *Mr. Wheeler* and *T. W. Parkinson*.

WINSLOW, J. The controlling question presented by the record is as to the admissibility of the evidence tending to show an oral contract of agency between the parties, by which the plaintiff undertook to find a purchaser for the defendant's farm upon commission. The defendant objected to all of this evidence on the ground that it tended to vary and contradict the written option contract afterwards made between the parties. If the evidence was admissible, the verdict and judgment must stand, because there was sufficient evidence to support it, but, if not admissible, then the verdict has nothing upon which to rest.

The principle that oral evidence cannot be received to vary, alter, or contradict the terms of a written contract is so elementary and well settled that it scarcely requires statement. It is a salutary rule, and one that has, we believe, been consistently adhered to by this court. But the rule itself suggests its limitations. It is the evidence which tends to establish an inconsistent obligation from that which is expressed in the writing which is rejected. Where, therefore, it is shown that there was an original verbal contract, and a part of it only has been reduced to writing, the rule does not apply as to the part not reduced to writing. 1 Greenl. Ev. (15th ed.), § 284*a*, and note; *Graffam v. Pierce*,

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143 Mass. 386. So, if the oral and written contracts are distinct and separate undertakings, though perhaps relating to the same property, the fact that one is in writing does not prevent the proof of the other by parol, if it be not inconsistent with the writing. *Snow v. Alley*, 151 Mass. 15; *Hahn v. Doolittle*, 18 Wis. 196; *Collette v. Weed*, 68 Wis. 428; 17 Am. & Eng. Ency. of Law, 443, note 5. These rules are also supported by English decisions. *Harris v. Rickett*, 4 Hurl. & N. 1; *Lindley v. Lacey*, 112 Eng. C. L. 578.

Now, in the case before us, the evidence of the plaintiff tended strongly to show that there was a valid oral contract between the parties, by which the plaintiff was to undertake to find a purchaser for defendant's farm, and was to receive, as commission for his services, all that was realized on the sale exceeding $35,000; that the price for which it was to be offered to purchasers was to be $40,000; and that, to enable plaintiff to better handle the transaction and show to the world that he was authorized to make the sale, the option contract was executed and delivered to plaintiff. The two contracts may exist together, and are not necessarily inconsistent. A principal may lawfully give his agent an option to himself to purchase property in the agent's hands for sale, and we see no reason why such an option should supersede a valid agreement of agency for sale to others upon commission. It was said in *Russell v. Andrae*, 79 Wis. 108, that "agents are frequently invested by their principals with the title to property, for convenience in making sales thereof, and we are aware of no rule of law which excludes parol testimony to show the purpose of the transaction when proof of it becomes necessary." To the same effect are *Huckabee v. Shepherd*, 75 Ala. 342; *Clever v. Kirkman*, 33 Law T. (N. S.), 672; *Rogers v. Hadley*, 2 Hurl. & C. 227. If, therefore, we regard the written option as a valid contract which authorized the agent to himself become

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the purchaser, it is a separate collateral contract which may consistently exist at the same time as the oral contract for sale of the property to others on commission, and hence does not supersede or vacate it. If, on the other hand, we regard the option as a mere writing, not intended by the parties to become a contract, but simply to be used by the agent as proof of his authority to make sale to others, the real character of the transaction may be shown. In either case the parol evidence which was received was admissible.

The charge of the court was not excepted to and is not preserved in the bill of exceptions; hence it must be conclusively presumed that the law was correctly stated to the jury. The evidence clearly showed, without contradiction, that plaintiff, after great exertion, procured the organization of a corporation which was ready and willing, and offered, to purchase the property for $40,000. Plaintiff therefore performed the entire parol contract, and was entitled to his commissions. When the defendant refused to deed the land to the corporation, the plaintiff was forced, in order to keep his engagements with the purchasing corporation, to fall back on his option and take title himself, and thus make himself the channel through which the title passed to the corporation. There is nothing in these facts which prevents the plaintiff from recovering his commissions, to which he had become fully entitled when he produced a *bona fide* purchaser. The defense in this case certainly comes with very ill grace. The defendant admits that he only asked $35,000 for the land. By plaintiff's successful exertions he has received $40,000, and proposes to retain the entire sum and let the plaintiff go unpaid. Both upon the law and the facts we think the verdict was right.

By the Court.—Judgment affirmed.

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PORTER, Appellant, vs. BEATTIE and others, Respondents.

April 16 — May 25, 1894.

Vendor and purchaser of lands: Fraudulent representations: Rescission.

1. The purchaser of a farm in a part of the country with which he was unacquainted had a right to rely upon representations in a plat exhibited to him by agents of the vendor, purporting to show the location, quantity, and nature of the land, although he afterwards made a hasty inspection of the farm in company with such agents, and although they employed no artifice to prevent a full investigation, where such investigation was made at an unfavorable season and the falsity of the representations in the plat were not obviously discoverable.
2. The agents having known, before the sale was consummated, the falsity of the representations in the plat and that the purchaser was relying thereon, and not having informed him of the facts, such representations were fraudulent, even if made in the first instance through inadvertence or mistake.

APPEAL from the Circuit Court for *Columbia* County.

On and prior to May 16, 1892, the defendant *John Ehr* owned the farm in question, situated about two miles west of Portage City. Early in April, 1892, he applied to the defendant *William Beattie*, a real-estate agent in Portage City, to sell said farm, and agreed with him, in writing, that he would take $2,600 for the same, less two per cent. commissions to be paid to said *Beattie*, and that said *Beattie* might, in addition, have all he could get over and above $2,600. Thereupon *Beattie* employed a Mr. Unger, residing at Marshall, about four miles from Waterloo, to aid him in selling said farm at $4,000, and agreed to give him a commission, in case such sale was effected, of six per cent. Unger employed Thomas A. Williams, of Waterloo, to aid in selling said lands at said price, and agreed to give said Williams one half of said six per cent. commission in case he effected such sale, to wit, the sum of $120. Williams caused a notice to be published in the Waterloo Democrat,

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April 22, 1892, which, omitting the portions applicable to other farms, read as follows, to wit: "Call at the office of T. A. Williams, and see plats for the following farms: . . . One farm, two miles from Portage, 272 acres, $4,000." Soon after the plaintiff in this action, having seen said notice in said newspaper, called on said Williams at his office, and by him was shown plat Exhibit A, purporting to represent the said farm. Said plat was in different colors,—one color representing plowed land; another color, marsh land; and another color, timber land. The lands so colored, and purporting to be the farm of said *Ehr*, are described as follows, to wit: The E. ½ of the N. E. ¼, and the N. E. ¼ of the S. E. ¼, *and the E. ½ of the N. W. ¼ of the N. E. ¼*, of section 3, all in township 12 N., of range 8 E.; also, thirty-two acres off the S. ½ of the S. E. ¼ and the E. ½ of the S. W. ¼, less eighteen acres lying north of the right of way of the Chicago, Milwaukee & St. Paul Railway Company, being in section 34, in township 13 N., of range 8 E.; *and also that part of the W. ½ of the S. W. ¼ of said section 34, lying south of said right of way.* At the bottom of said plat, and on the back thereof, was the following writing to wit: "The above contains 272 acres. About 120 under plow—balance timber and grass land. All fenced, mostly with wire. Land is nearly all first class. The hay land is estimated to cut 150 tons. Water on both parts, with a well at the house and well at the barn. House 16x28, two stories high. Frame barn, 24x52, with basement for cattle. Machine shed and other buildings. Buildings are new and first-class. Owner is very old, and has moved to the city. Price, $4,000. Payments can be arranged to suit purchaser."

Soon after the plaintiff visited said farm in company with said Williams and said *Beattie*. Thereafter, and on May 16, 1892, the said *John Ehr* and *Anna Maria Ehr*, his wife, executed a power of attorney to the said *William Beattie*,

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to bargain, sell, and convey their farm in Columbia county, described as follows, to wit: "*The west fifteen acres of the southwest quarter of the northwest quarter, and the west fifteen acres of the northwest quarter of the southwest quarter of section numbered two* (2); the east half of the northeast quarter and northeast quarter of southeast quarter; *and that part of east half of the northwest quarter lying north of the highway crossing the same, in section number 3;* all of the above being in township number twelve (12) north, of range number eight (8) east; also thirty-two acres off the south side of south half of southeast quarter and the east half of southwest quarter, less eighteen acres lying north of the right of way of the Chicago, Milwaukee and St. Paul Railway Company, being in section number thirty-four (34) in township number thirteen (13) north, of range number eight (8) east, containing 272 acres, be the same more or less," — which power of attorney was duly witnessed and acknowledged. On May 16, 1892, the said *John* and *Anna Maria Ehr* also executed a warranty deed of all the same premises described in said power of attorney, but the grantee's name therein, and the consideration thereof, were left blank therein, and which deed was duly witnessed with two witnesses, and acknowledged.

On May 19, 1892, the said *Beattie* completed the trade with the plaintiff, inserted his name as grantee in said deed, and delivered the same to him, and the said plaintiff at the same time paid to the said *Beattie* $1,000 in cash, and gave back to him two notes, secured by a mortgage on said premises; and thereafter the said *Beattie* paid to the said *John Ehr* the said $1,000, and also the sum of $1,548, and the said *John Ehr* thereupon assigned said notes and mortgage to the said *Beattie*, who has since held the same.

On August 15, 1892, the plaintiff claims to have discovered that he had been defrauded in the purchase of said land, and thereupon, and on November 23, 1892, he com-

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menced this action to set aside said notes and mortgage and said deed, and to have his damages ascertained, assessed, and found, and for judgment against the defendants for the amount thereof, and that the same be adjudged to be a lien upon said lands so conveyed to the plaintiff, and for such other and further relief as to the court should seem just and equitable. The defendant *Beattie* answered the complaint by way of admissions and denials and counter allegations, and the said *John* and *Anna Maria Ehr* also answered in a similar way. The case coming on to be tried, the said plaintiff and his wife executed and acknowledged, in the presence of two witnesses who signed their names thereto as such, a deed of said premises so conveyed to them, and tendered the same back to the said *John Ehr* upon said trial, and offered the same in evidence, and the same is filed with the clerk of the court.

At the close of the trial, and on May 15, 1893, the court made its findings of fact and conclusions of law, among other things, to the effect that said *Beattie* was authorized by the said *John Ehr* to sell said lands, and to employ said Williams to assist in selling the same; that said Williams had a plat in his possession, as mentioned; that said plat was not an accurate description or representation of said farm, in several particulars; that the plaintiff saw said plat at the office of said Williams, in Waterloo, before he saw said lands; that he thereafter visited said lands, and was shown over said farm, and was given every opportunity to examine the same; that he was not shown any lands as belonging to the farm except such as in fact belonged to said farm; that the plat was not referred to in any way while the plaintiff was so examining said farm; that all the parties understood that the farm contained 272 acres, whereas the plat represented a considerable more than that amount; that the deed was made and mortgage given as stated; that the plaintiff purchased said lands from an actual in-

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spection thereof; that he was not misled as to the farm by the error in said plat, nor influenced thereby; that the deed which he received correctly describes the farm so belonging to *Ehr*, and the lands so shown to the plaintiff, and no others. And as conclusions of law the court found that the plaintiff was not entitled to have the sale set aside, nor to judgment for damages, as demanded; that the complaint should be dismissed, but without costs to either party. From the judgment entered accordingly the plaintiff appeals.

For the appellant there were briefs by *Bushnell, Rogers & Hall*, and oral argument by *A. R. Bushnell* and *F. W. Hall*. To the point that, upon the facts, plaintiff was entitled to the relief sought, they cited *Risch v. Von Lillienthal*, 34 Wis. 256; *Kuelkamp v. Hidding*, 31 id. 503; *Middleton v. Jerdee*, 73 id. 39; *Miner v. Medbury*, 6 id. 295; *Smith v. Richards*, 13 Pet. 26.

J. H. Rogers and *H. T. Ames*, for the respondents.

Cassoday, J. The trial court failed to find the value of the land conveyed. *Mr. Ehr* readily agreed to take $2,600 therefor, less two per cent. commission for making the sale. There is nothing to indicate that he ever expected to get any more, nor that in his judgment it was worth any more. There is some evidence that it was not worth as much. It seems quite certain that it was not worth any more.

Beattie was to have all he could get over the $2,600, as well as the commissions named. *Beattie* had been in the real-estate business at Portage for about thirty years. Living thus about two miles from the farm, and being in that business, we may fairly assume that he knew all about its value. It does not appear that *Beattie* made any attempt to sell the farm to any one living in the vicinity of it and likely to know its real quality, character, and value.

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His first move toward selling the same, apparently, was to enlist Unger, of Marshall, Dane county, in the enterprise, presumably with the view of securing a purchaser in the vicinity of Unger's residence. The price was fixed by *Beattie* at $4,000, and Unger was to receive for his services in procuring such purchaser six per cent. on the sale, to wit, the sum of $240. Accordingly, *Beattie* and Unger had an interview, and *Beattie* furnished Unger with what purported to be a full description of the farm thus proposed to be sold, substantially as stated in Exhibit A, set forth in the foregoing statement, with the portion thereof constituting the plat having one color to express plow land, another to express hay land, and another to express timber land. *Beattie* at first testified that he never saw that plat, and did not know in whose handwriting Exhibit A was, and sought to create the impression that he was in no way responsible for anything contained in that exhibit. But on cross-examination he was finally compelled to testify to the effect that he wrote out a description of the land, and drew a plat thereof in different colors with pencils, representing the plow land, timber land, and hay land, and the line of the Chicago, Milwaukee & St. Paul Railroad and the Portage road, on it, and gave the same to Unger; that he had never tried to find that plat, although a copy of Exhibit A was served upon him with the complaint in this action; that he made the plat and statements he gave to Unger to sell the land, and as a kind of representation of the land; that he could not tell, at first, wherein the plat he so made differed from the one on Exhibit A, but finally did not think it represented the timber land north of the highway as extending so far west; that he gave to Unger all the statements contained in Exhibit A, except that the "buildings are new and first-class." These admissions were drawn from *Beattie* on cross-examination, in fragments, and were severally made with a hesitancy and prevarication indica-

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tive of a conscious desire to suppress such facts as might be damaging to the defense. There is nothing to indicate that Unger knew anything about the land, except such knowledge as he obtained from *Beattie*. In fact, it does not appear that he was at that time a dealer in real estate, but the reverse.

Upon receiving the descriptions, plat, and statements from *Beattie*, Unger appears to have gone at once to Williams, a real-estate dealer at Waterloo, and engaged him to aid in finding a purchaser for the land, and agreed to give Williams therefor one half of his commissions,—that is to say $120; and he thereupon left with Williams Exhibit A, as a true description of the farm to be sold. Williams thereupon advertised in the Waterloo Democrat for those wishing to buy farms to call at his office and, among others, examine this plat. The plaintiff saw the notice, and in pursuance of it went to Williams' office. He was there shown Exhibit A, and examined it carefully. It presented an attractive bargain, and so the old man agreed with Williams to go with him and look at the farm. Unger resided only four miles from Waterloo; and, as he was not then in the real-estate business, it is fair to assume that he had already agreed with *Beattie* to put the matter in the hands of Williams to secure a purchaser. In fact the trial court finds that *Beattie* employed Williams to assist in selling the lands, and that "Williams had a plat in his possession purporting to represent the said farm," thereby referring to Exhibit A. We must assume that *Beattie* was the author of that plat and all that is contained in Exhibit A, and that he made and devised the same for the sole purpose of securing a purchaser of the farm at a price $1,400 higher than was asked by the owner.

With such knowledge as the plaintiff obtained from Williams and Exhibit A, he and Williams went to Portage. They got there in the afternoon, and after dinner they and

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Beattie visited the farm. At evening the plaintiff returned to *Beattie's* house, and remained with him all night, but did not agree to buy the farm until some days thereafter. The plaintiff had never seen the farm, nor been in the vicinity of it, before. He knew nothing about it, therefore, except what he saw that afternoon, and what he was told by *Beattie* and Williams, and the facts and representations made in Exhibit A. The statement of facts and representations contained in that exhibit were grossly and confessedly false in several particulars. The exhibit stated that the farm contained 272 acres, whereas *Mr. Ehr* was the owner of only 254 acres. The exhibit described about ninety-five acres which *Ehr* did not own, and this is found as a fact by the trial court, the same being made up of the two pieces described in italic letters in the portion of the foregoing statement setting forth that exhibit. The exhibit only described 214 acres of the land which *Mr. Ehr* did own, and entirely failed to describe or mention forty acres which he owned; and this is found as a fact by the trial court; and the same are described in the deed to the plaintiff and in italic letters in the foregoing statement. The railroad is located on the exhibit substantially in the right place, but it falsely represents the Portage road or public highway as running directly west on the town line from the S. W. corner of the S. E. ¼ of section 34, whereas, in truth and in fact, it runs some 30-odd degrees south of west from that point, or a little east of it. Between that road and the town line on the north is a three-cornered piece of land, containing about ten acres, on the north side of the N. E. ¼ of the N. W. ¼ of section 3, mentioned in the deed. The land conveyed to the plaintiff extended south of the town line for three quarters of a mile, the southern end of which extends nearly to the river, and the southern portion of the same is very much the poorest portion of the farm; and there is where thirty acres is located

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which was not described on Exhibit A. Exhibit A describes the portion of the farm on the north side of the town line as extending from the east line of section 34 to the west line of that section,—a distance of one mile,—with a strip twenty-five or thirty rods wide along the west side of the S. W. ¼ of the S. W. ¼ of section 34, designated thereon as timber land, whereas, in truth and in fact, that portion of the farm did not extend as far west, into eighty rods; and along the west side of the E. ½ of the S. W. ¼ of said section 34, and the west end of the ten-acre piece mentioned, is a strip of timber land similar to that mentioned, and east of that strip of timber was plow land. The plaintiff went upon the plow land east of the timber. He repeatedly asked where the lines were, and was each time told to keep within the fences. But there was no fence on the west side, where the timber was located, and no one appears to have pointed out to him the location of the west line of the land in the timber. It is said that at no time while he was on the farm did he mention the plat or Exhibit A. But he had no occasion to mention it, since he had been informed by it that the land extended from the east line of the section to the west line of the section, and he had the right to rely upon such representations. In fact, he had no means of disputing them, unless he measured the distance, even had the west line of *Mr. Ehr's* lands been pointed out to him, which was not done. One of the worst deceptions consisted in representing that a strip of land eighty rods wide, west of *Mr. Ehr's* land, and belonging to somebody else, was the property of *Mr. Ehr*, and then describing the west portion of it as timber land, the same as was true in respect to *Ehr's* land. Exhibit A also misrepresented the amount of the plow land, the quality of the soil, etc., etc.

The plaintiff was at the time nearly seventy-three years of age, and, seemingly, had always been a farmer. He was

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accompanied by two experienced real-estate dealers. He was a total stranger to the land, and his inspection of it was at a time of year not best calculated to discover its poverty of soil. He was approached and drawn into an inspection of the land, apparently, by indirection and circumvention, and upon representations which were grossly false and peculiarly deceptive. There were seven different pieces of land described in the deed. To a farmer not skilled in such matters it would be very difficult, unaided, even if shown the outside boundary lines, to apply such several descriptions to such a farm. That he relied upon the false representations contained in Exhibit A is apparent from the fact that, when he got his deed, he or his wife called upon Mr. Williams for the plat, and Mr. Williams gave Exhibit A to him, in the presence of *Beattie*. One thing is very certain: Either *Beattie* knew from the beginning that the description in Exhibit A was false, or else he ascertained the facts prior to May 16, 1892, when the power of attorney to *Beattie* and the deed from *Ehr* and wife were drawn, for they each accurately describe the 254 acres of land belonging to *Mr. Ehr*, and no other land. That was at least three days before the trade was consummated. *Beattie* and Williams both knew that the plaintiff had been induced by the false representations contained in Exhibit A to visit the land with a view of purchasing the same; and yet neither of them ever informed him or intimated to him that Exhibit A contained any such misrepresentations. If such misrepresentations in Exhibit A were made through some inadvertence or mistake and without any design to defraud, then they should have informed the plaintiff of the facts when they were ascertained and before the trade was consummated. But there is no pretense that they, or either of them, did so. Men are presumed to intend the ordinary and natural result and consequence of their own conduct. The natural tendency of such false

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representations, so made to the plaintiff under the circumstances mentioned, was to defraud him into the purchase of the land at a very greatly exorbitant price. The object to be sought furnished a strong motive to perpetrate the fraud. Some of the false representations so made are expressly found by the court, and some of the others are established by the undisputed evidence. "Fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false." *Montreal River Lumber Co. v. Mihills*, 80 Wis. 562, and cases there cited.

The trial court decided against the plaintiff apparently on the sole ground that he had, in law, no legal right to rely upon any of such misrepresentations, after having visited the premises and having had an opportunity of investigating such facts for himself. In *Castenholz v. Heller*, 82 Wis. 30, the purchaser, prior to the purchase, had in his possession a correct abstract and a true plat of the lots purchased, from which he might have learned the true boundary of such lots, yet it was held that he was not thereby precluded from recovery by reason of the false representations made. The mere fact that neither *Beattie* nor Williams nor the vendor, at the time the plaintiff inspected the farm, used any artifice to prevent or dissuade him from further investigating whether the statements and representations contained in Exhibit A were true or false, did not prevent the plaintiff from relying upon such misrepresentations, in so far as their falsity was not obviously discoverable by him. *Gunther v. Ullrich*, 82 Wis. 222; *McKinnon v. Vollmar*, 75 Wis. 82. We must hold that the sale was procured by false representations, upon which the plaintiff relied, to his great damage; and that he is entitled to a rescission of the same. The defendants must surrender the notes and mortgage for cancellation, and in case of their transfer to a

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bona fide purchaser the defendants must amply protect the plaintiff against any loss from the same. The defendants must also repay to the plaintiff the $1,000, with interest thereon from May 19, 1892, and also any other legitimate damages in consequence of such fraud, less the net income of the farm during the time of the plaintiff's possession thereof; and in case such amount cannot be ascertained with reasonable certainty, then, in lieu thereof, a fair occupation rent during such possession. For the purposes mentioned the respective parties may introduce further evidence. The final judgment to be entered herein is to be made a charge on said premises until the several conditions and requirements mentioned have been fully performed by the defendants.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for further proceedings and final judgment in favor of the plaintiff and against the defendants in accordance with this opinion.

DONKLE, Appellant, vs. MILEM, Respondent.

May 1 — May 25, 1894.

(1-3) *Appeal: Review of interlocutory orders: Judgment on the pleadings: Exceptions.* (4) *Promissory notes: Suretyship: Extension of time: Estoppel: Alteration.*

1. On appeal from a judgment the supreme court cannot review interlocutory orders which do not involve the merits and necessarily affect the judgment, unless they are excepted to and, with the papers on which they are founded, embraced in a bill of exceptions.
2. An order opening a judgment by default and allowing the defendant to serve an answer does not involve the merits and necessarily affect a subsequent judgment in favor of the defendant on the pleadings.

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3. Where judgment is rendered in favor of the defendant on the pleadings, no exception is necessary to entitle the plaintiff to a review of the decision on appeal.

4. At the maturity of a note the maker asked for an extension of time, offering to have his wife sign the note. The payee agreed to grant an extension if a surety on the note would consent. The maker represented that he had seen the surety and knew he would consent, and thereupon the wife signed the note; but the surety, when applied to, refused his consent to the extension. Afterwards the payee caused judgment to be entered on the note against the maker and his wife and the surety. *Held*, that by so doing he was estopped to assert that there was no extension or that there was no consideration for such extension because the note was not valid as against the maker's wife; and that the surety was discharged from liability. [Whether the mere addition of the signature of the maker's wife, without the consent of the surety, was such an alteration of the note as to defeat any remedy on it against the latter, not determined.]

APPEAL from the Circuit Court for *Dane* County.

The appellant entered judgment by confession in the circuit court for Dane county, on an ordinary judgment note, joint and several in form, against Arthur B. White, Susan G. White, and the respondent, *Matthew Milem*. *Milem* applied by motion to the court for an order opening the judgment as against him, and to be allowed to answer, founded on the affidavits of all of the defendants and a proposed answer, duly verified, denying the execution of the note described in the plaintiff's complaint, but admitting that he did sign a note for the same amount with the defendant Arthur B. White, and as his surety; that the plaintiff knew that he signed it only as surety or accommodation maker with said White, and that the latter received the whole of the consideration thereof. It alleged an extension of the time of payment of said note for one year, for a good and sufficient consideration, by agreement between the defendant Arthur B. White and the plaintiff, but that he (*Milem*) had no notice thereof and never consented thereto. The answer further alleged that, after the

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note was signed by *Milem* and delivered to the plaintiff, it was materially altered and changed by the act or procurement of the plaintiff, without his consent thereto; that, without his knowledge or consent, the plaintiff procured the defendant Susan G. White to sign the said note as a maker. The court allowed the proposed answer to the complaint, and directed the judgment to stand as security, and stayed proceedings until the determination of the issue, but no appeal was taken from this order.

The plaintiff, for an amended complaint and by way of reply to the answer served by the defendants, set up, in substance, the execution and delivery of the note and warrant of attorney by the defendant Arthur B. White for a loan to him of $200, and by the defendant *Milem* to secure it, and that the money was lent upon the faith and credit of *Milem*. Upon the maturity of the note, White requested an extension of time for one year, offering the signature of his wife, Susan G. White, to the note, if it should be granted, and that the plaintiff informed him that he would grant such extension provided *Milem* would consent thereto, and not otherwise. Upon the representation of White that he had seen *Milem* and knew he would consent to the extension, he had his wife, Susan G., sign her name to said note, below the names of the original makers. The plaintiff refused to grant any extension until he had seen *Milem*. *Milem* refused to consent to the extension. The plaintiff informed the signers, in the presence of *Milem*, that he would not consent to the extension; and, White and *Milem* having neglected and refused to pay the note, judgment was entered thereon as before stated. It alleged the insolvency of White, and that the only security for said debt and judgment was that afforded by the signature of *Milem*, upon which, and not otherwise, plaintiff consented to make the loan, and alleged that he had in no way granted any extension of time for the payment of the note, and closed

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with a demand for judgment for the amount and costs, asking that said judgment as against Susan G. White be vacated.

The case coming on for trial, the defendant *Milem*, as appears from the judgment, objected to the admission of any testimony under the amended complaint, and the court ordered judgment thereon against the plaintiff and for the defendant *Milem* for his costs, which was entered accordingly, and adjudging that the judgment theretofore entered be vacated and set aside as to him. The plaintiff appealed.

For the appellant there was a brief by *G. S. Martin*, attorney, and *Richmond & Smith*, of counsel, and oral argument by *J. B. Smith* and *G. S. Martin*. They contended, *inter alia*, that the signature of the note by Mrs. White, under the circumstances, made her merely a guarantor. It was a new and independent contract which in no way disturbed the relation of the original parties and did not constitute an alteration of the note. *McCaughey v. Smith*, 27 N. Y. 39; *Brownell v. Winnie*, 29 id. 400; *Mersman v. Werges*, 112 U. S. 142; *Stone v. White*, 8 Gray, 589; *Tenney v. Prince*, 4 Pick. 385; *Warner v. Price*, 3 Wend. 397; *Harris v. Warner*, 13 id. 400; Dan. Neg. Inst. secs. 1311, 1313, 1389; *U. S. v. Hodge*, 6 How. 279, 283; *Krouskop v. Shontz*, 51 Wis. 204; *Gorden v. Robertson*, 48 id. 493; *Fuller v. Green*, 64 id. 159.

For the respondent there was a brief by *Smith & Buell*, and oral argument by *Rufus B. Smith*. They argued, among other things, that the addition of another name after the execution of the note is a material alteration and discharges those who have already signed it. Randolph, Com. Paper, sec. 1744; *Nicholson v. Combs*, 90 Ind. 515; *Singleton v. McQuerry*, 85 Ky. 41; 2 Parsons, Notes & Bills, 559; *Hamilton v. Hooper*, 46 Iowa, 515; *Dickerman v. Miner*, 43 id. 508; *Sullivan v. Rudisill*, 63 id. 158; *Bank*

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of Limestone v. Penick, 5 Mon. 25; *Harper v. Stroud*, 41 Tex. 367; *Lunt v. Silver*, 5 Mo. App. 186; *McVean v. Scott*, 46 Barb. 379; *Chappell v. Spencer*, 23 id. 584; *Owens v. Tague*, 3 Ind. App. 245; 2 Brandt, Suretyship, sec. 388.

PINNEY, J. 1. The order opening the judgment as to the defendant *Milem* and allowing him to serve an answer and defend was an order "upon a summary application in an action after judgment," and was appealable. R. S. sec. 3069, subd. 2. But the plaintiff did not appeal from this order, and his right to do so did not survive the judgment thereafter rendered in favor of the defendant *Milem*. *American B. H., O. & S. M. Co. v. Gurnee*, 38 Wis. 533. There is no bill of exceptions making the ruling of the court on the motion to open the judgment and allow the proposed defense a part of the record, and there is nothing whatever to show that the plaintiff excepted to this order. It has uniformly been held in numerous cases for a period of more than thirty years, that, on an appeal from a judgment, this court cannot review interlocutory orders which do not involve the merits and necessarily affect the judgment, unless they are excepted to and, with the papers on which they are founded, embraced in a bill of exceptions. *Cornell v. Davis*, 16 Wis. 686; *Williams v. Holmes*, 7 Wis. 168, and cases cited in note.

2. It is claimed that the order in question is reviewable on appeal from the judgment in favor of *Milem*, under sec. 2, ch. 242, Laws of 1893, similar in its provisions to R. S. sec. 3070, which provides that, "upon an appeal from a judgment, as well as upon a writ of error, the supreme court shall review any intermediate order or determination of the court below which involves the merits and necessarily affects the judgment, appearing upon the record transmitted or returned from the circuit court, whether the same were excepted to or not; nor shall it be necessary in

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any case to take any exception or settle any bill of exceptions to enable the supreme court to review any alleged error which would, without a bill of exceptions, appear upon the face of the record." Mere interlocutory motions and orders, not involving the merits and necessarily affecting the judgment appealed from, are no part of the record or judgment roll for the purposes of an appeal from the judgment, unless made so by a bill of exceptions. *Cord v. Southwell*, 15 Wis. 211; *Geisinger v. Beyl*, 71 Wis. 361; *Kelley v. C., M. & St. P. R. Co.* 53 Wis. 76; *Edleman v. Kidd*, 65 Wis. 18. It is plain, therefore, that unless the order can be said to be one *involving the merits and necessarily affecting the judgment* appealed from, the plaintiff has lost all right to have it reviewed in this court. The judgment appealed from is not affected in any way or manner by this order. It was rendered, as already stated, upon an objection and determination that, under the facts stated and conceded by the pleadings, the plaintiff had no cause of action against the defendant *Milem*. The order did not therefore, in any proper sense, involve the merits of the controversy. It cannot be a matter of legal concern how the pleadings found in the record came there, if, upon their face, they show that the plaintiff had no right of action against the defendant; and the order, under these circumstances, has no relation to the merits, and cannot be said to affect the judgment, for that stands and depends solely upon the pleadings, and wholly independent of the order. The objection to the reception of any evidence was, in effect, a demurrer *ore tenus* to the so-called amended complaint by way of reply to the defendant's answer, and was a demand for a judgment on the pleadings, which the court gave accordingly.

For these reasons the assignment of error based on the order in question must fail.

3. It was not necessary that there should have been any

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exception taken to the decision of the court rendering judgment on the pleadings in favor of the defendant, to entitle the plaintiff to a review of that question in this court. The question whether the pleadings support and warrant the judgment is one arising upon the record proper, and may be tested by writ of error or appeal from the judgment. *Edleman v. Kidd*, 65 Wis. 18; *Riley v. Riley*, 34 Wis. 372; *Bowman v. Van Kuren*, 29 Wis. 209. The objection taken to the pleadings, and the action of the court thereon, clearly appear upon the face of the judgment. Where there is no exception to the finding of the court, upon appeal the judgment will be reversed if it is not sustained by the pleadings and finding. *Cramer v. Hanaford*, 53 Wis. 85, 87. The pleadings in this case, upon which alone the judgment was rendered, sustain the same relation to the judgment as a finding after trial; and whether the judgment here appealed from was warranted must be tested by the pleadings and matters legally of record in the action.

4. Upon the facts stated in the amended complaint it is clear that the plaintiff made the loan to White, and *Milem* signed the note with him to secure its payment. He was surety for White, and the plaintiff knew it, for it is alleged that he refused to make a desired extension of time of payment when the note was about to become due, if Mrs. White would sign the same, unless the defendant *Milem* consented to it. White represented that he had seen *Milem* and that he would consent. Mrs. White signed the note, and *Milem*, when afterwards applied to, refused his consent. A few days thereafter the plaintiff entered the judgment in question against White, *Milem*, and Mrs. White. This judgment was in full force at the time of the trial, certainly as between the plaintiff and White and his wife, and as to *Milem* as well, for it stood under the order of the court as to him as security. It was conclusive evidence that the note was a valid and binding obligation as between the plaintiff and

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Mrs. White, and in his favor, notwithstanding the objections urged to its validity as to her by the plaintiff's counsel, that she was a married woman and that it was invalid by reason of the operation of the statute of frauds. The plaintiff was precluded and estopped from asserting its invalidity, or that there was a want of consideration as between the plaintiff and White for the alleged extension of the time of payment of the note. The plaintiff, after he knew that *Milem* had refused his consent to the arrangement, elected to enter judgment against all the parties who had signed the note, Mrs. White as well. He could not be heard to say thereafter that there was no extension of time of payment and no consideration for the note. If *Milem* had afterwards, as surety, paid the debt and so acquired the right to proceed against White as his principal, he would have been precluded by means of this arrangement of the right to proceed against White immediately for his reimbursement, and his legal rights in this respect would have been suspended during the period of the extension. This was such an interference with *Milem's* rights as surety as discharged him from liability to the plaintiff. The judgment was, we think, conclusive evidence that the original contract had been altered so as to change the legal effect of it as between the original parties to it. The liability of a surety is one *strictissimi juris.* He has a right to stand upon the exact words of his contract, and to insist that it shall remain intact and without any alteration which may possibly in any way affect or impair his rights or embarrass him in the assertion of them. 2 Brandt, Suretyship, sec. 388; *Drinkwine v. Eau Claire*, 83 Wis. 430; *State v. McFetridge*, 84 Wis. 500. Any change in the personality, number, or relations of the parties to an instrument is, as a general rule, a material alteration. 1 Am. & Eng. Ency. of Law, 506, and cases cited by counsel for respondent. It is not, however, necessary to decide whether the mere ad-

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dition of the name of Mrs. White to the note, without the consent of *Milem*, was such an alteration of the contract as to defeat any remedy on it against *Milem*,—a question much discussed at the argument, and upon which there is a considerable conflict of opinion.

Upon the facts conceded in the amended complaint, and established as well by the judgment, we must hold that the judgment in favor of *Milem*, appealed from, is correct and must be affirmed.

By the Court.—The judgment of the circuit court is affirmed.

CURTIS BROTHERS & COMPANY, Appellant, vs. HOXIE and another, Respondents.

May 2 — May 25, 1894.

Attachment: Debt fraudulently contracted: Statements to commercial agencies: Appeal: Evidence: Transactions with person since deceased.

1. An order discharging an attachment will not be reversed on appeal, except upon a clear preponderance of the evidence against the finding of the court below.
2. In November, 1889, defendants made a statement to a commercial agency, showing assets about $250,000 in excess of liabilities, and naming plaintiff and others as references. In May, 1890, they orally stated the same thing to one V., who was collecting information for another agency. These statements greatly underestimated defendants' liabilities, but the evidence tends to show that they were made in good faith and that defendants did not know they were insolvent until they made an assignment in September, 1890. Plaintiff's manager saw the former statement and also talked with V., who told him the substance of the oral statement and that he had learned from other sources that defendants were practically what they represented themselves to be. Plaintiff had had frequent transactions with defendants for several years, and had knowledge of their business methods and the character of their

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enterprises, which were widely extended and of a somewhat percarious and uncertain nature. Between April 2 and September 1, 1890, plaintiff sold to defendant on credit merchandise to the amount of $30,000, the principal item being $21,000 worth of lumber which, it appears, plaintiff was anxious to sell to them and defendants were reluctant to purchase. During these transactions the defendants' statements were not mentioned, but plaintiff's manager testified that in extending the credit he relied on the written statement of November, 1889, corroborated by the statement to V. Upon the evidence, showing the above facts among others, it is *held* that there was no clear preponderance of proof that the debt was fraudulently contracted, so as to sustain an attachment.

3. Under the circumstances, the statement of November, 1889, was too remote to justify the plaintiff in relying upon it absolutely; and the defendants were not responsible for what V. told plaintiff's manager, he having no authority, express or implied, from them to make such statement.

4. After the death of one of the defendants, the survivor's son, who had no interest in the suit and from whom neither party derived any interest, was competent to give evidence of conversations with the deceased in his lifetime.

APPEAL from the Circuit Court for *Langlade* County.

This is an appeal from an order of the circuit court for Langlade county vacating the attachment issued in the above action. On the 6th of September, 1890, Hoxie & Mellor, partners, etc., were indebted to the plaintiff in the sum of $30,032.52 upon demands not then due, for the recovery of which this action was brought, and a writ of attachment was issued in the manner prescribed by law upon an affidavit made by Cornelius S. Curtis, the general manager of the plaintiff, alleging as cause therefor that he had good reason to believe, and verily did believe, that the said defendants had assigned, conveyed, and disposed of, or were about to assign, convey, dispose of, or conceal, their property, with intent to defraud their creditors; also, that the defendants fraudulently contracted the debt respecting which this action is brought. The defendants traversed the affidavit, denying the existence of the causes alleged

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for the attachment. On the same day the attachment was levied, and immediately thereafter, Hoxie & Mellor made a voluntary assignment to Charles V. Bardeen of all their property, etc., for the benefit of and in trust for their creditors, excepting property exempt from execution. The assignee also intervened and made a similar traverse of the affidavit for the attachment. Before the trial, *Lyman E. Barnes* had become such assignee in the place of Bardeen, and was substituted in his place. The defendant's counsel suggested the death of E. N. Mellor since the commencement of the action, and it proceeded against his surviving partner as such.

For the appellant there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *C. E. Wild* and *J. G. Flanders*.

For the respondents there were separate briefs by *Charles W. Felker*, attorney, and *Charles Barber* and *Thompsons, Harshaw & Davidson*, of counsel, and the cause was argued orally by *Mr. Felker*, *Mr. Barber*, and *Mr. C. E. Thompson*.

PINNEY, J. 1. The issues raised by the special answer and affidavit for the writ of attachment are: (1) Whether, at the time it was issued, the defendants had in fact assigned, conveyed, and disposed of, or were about to assign, convey, dispose of, or conceal their property, with intent to defraud their creditors; (2) whether the defendants fraudulently contracted the debt respecting which the action was brought.

Proof of good reason on the part of the creditor to believe the truth of the charge is not sufficient to sustain the attachment, but the substantive charge itself must be proved. *Davidson v. Hackett*, 49 Wis. 186. And the affirmative of the issues is on the plaintiff. R. S. sec. 2745. An order discharging the attachment will not be reversed

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on appeal, except upon a clear preponderance of the evidence against the finding of the court below. *Rice v. Jerenson*, 54 Wis. 248; *Lord v. Devendorf*, 54 Wis. 491.

The evidence is very voluminous, extending over 500 printed pages, and the trial in the circuit court appears to have been a very lengthy and laborious one. The difficulty of arriving at a correct conclusion upon questions of fact by an appellate court, which, in the nature of the case, cannot have the time and obvious advantages possessed by the court below in arriving at a result, has been frequently pointed out, and fully justifies the rule stated in *Lord v. Devendorf*, *supra*, and in many other cases, repeatedly applied to the review of mere questions of fact by an appellate court. Mellor, one of the defendants, although examined under sec. 4096, R. S., before trial as an adverse party, died before the trial, and the fraudulent acts charged as foundation to warrant the attachment are claimed to have been done or committed by him only, while *Hoxie*, the surviving partner, is in no way inculpated, except constructively by reason of his copartnership relation with Mellor. An elaborate statement of the evidence and of our reasons for the conclusions at which we have arrived would serve no useful purpose, and we shall content ourselves with a somewhat general statement of our views. We are clearly of the opinion that, considering all the evidence, no cause for the attachment was satisfactorily shown under the first charge in the affidavit, namely, that the defendants had assigned, conveyed, and disposed of their property, or were about to do so, or conceal the same, with intent to defraud their creditors. The transactions relied on in support of this charge were not necessarily or legally fraudulent, and the evidence, we think, wholly fails to show that they were entered into with the fraudulent intent upon the part of the defendants, or either of them, charged in the affidavit. The evi-

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dence in support of this charge is, for the most part, uncertain and inconclusive, and is, we think, in all material respects met and satisfactorily explained by the evidence on the part of the defendants.

2. The more difficult question is whether it appears from a clear preponderance of proof that the defendants fraudulently contracted the debt respecting which the action is brought. It appeared, in substance, that the defendants had been carrying on a very extensive business in logging, lumbering, and merchandise in northern Wisconsin and Michigan, at Antigo, Bessemer, Marinesco, Bryant, and Ironwood, from 1885 down to the time they assigned (September 6, 1890), and that the plaintiff, an Iowa corporation, having an office at Wausau, Wis., had numerous and frequent business transactions with them down to the latter date, which had been conducted on its part by C. S. Curtis, its general manager. Plaintiff was a manufacturer and dealer at Wausau in sash, doors, blinds, and lumber, and sold the defendants during the year 1890, from April 2d to September 1st, lumber and merchandise to the amount of $30,032.52, of which $21,000 was for a lot of lumber at Marinesco, sold June 13, 1890. Curtis, the plaintiff's general manager, testified that he extended credit and times of payment on the other bills, and relied in so doing on the statements made by defendants to the commercial agency, one of which, signed "Hoxie & Mellor," to R. G. Dun & Co., and dated "November 26, 1889," was put in evidence, and was upon a printed form for answers to various interrogatories, many of which were not answered. It contained various items of assets and liabilities, showing total liabilities of $250,000, amount of assets over liabilities $254,000, and it stated at the foot: "The above is a true and accurate statement of our assets and liabilities, and is presented as a basis of credit through the reports of the mercantile agency,"— and was signed in the name of the firm by the

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defendant Mellor, and it stated that the firm did a banking business with the National Bank of Oshkosh and Bank of Antigo, and named as references said banks; W. W. Hutchinson, Antigo; *Curtis Bros. & Co.*, Wausau. One Van Horn, a traveling collector of information for Bradstreet's Commercial Agency, testified that he had called on defendants at Antigo the latter part of May, 1890, and that Mellor gave him a partial statement; that he said he had recently made to that house a substantially correct statement, but that their assets then were $495,000 and liabilities $235,000; that he, Van Horn, told Curtis at Wausau the substance of the statement in a conversation, in a general way, as to the reliability of the defendants, and gave him what he had ascertained on the outside as agent for his company; that he made those inquiries of banks and other parties, among others of one Trever, the Bank of Antigo, and Langlade County Bank, and found out that they were practically what they represented themselves to be. Thinks he told Curtis what he found outside, as well as what Mellor told him. Saw Curtis again on the train, and he seemed more interested. Saw him four or five days after that, when they talked it over quite lengthily. The plaintiff was then a subscriber to the Bradstreet Agency. It makes up a book with ratings in it yearly, which it sells or leases to subscribers, and with detailed reports on the books in Milwaukee, which are furnished on application to subscribers. Hoxie & Mellor were subscribers at the time.

The witness Curtis testified that he first saw the statement put in evidence at the First National Bank of Wausau, about January 1, 1890; that he was a member of the discount committee, and this was when engaged in passing on Hoxie & Mellor's paper; that he remembered the net balance of assets stated on it to be $254,000, but he had been unable to find the paper; that he was the credit man of the plaintiff at Wausau, and relied in extending the

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credits to Hoxie & Mellor "on that statement, *corroborated by the statement of Van Horn;*" that he had a conversation with Mellor, just prior to bringing the action in Antigo, as to the financial condition of the firm in June, 1890, and he said they had two dollars in assets to pay every one in liabilities; that on account of illness of their bookkeeper he could not tell what their liabilities were,— the books were not posted, and he could not tell exactly. This was September 1, 1890. On the 6th of September Mellor still held that the firm owed about $300,000. The $21,000 sale of lumber at Marinesco to defendants embraced all the stock the plaintiff had there, it having sold out its interest in the mill at that place. Plaintiff's first item of account with defendants in 1890 was under date of April 2d, to the amount of $48.46, but it seems there might have been some notes or an account against them besides.

After the assignment, a statement of the affairs of the defendants was made by one Bartz, as an expert accountant, who had until then been head man in the plaintiff's office, when he went into the employ of Bardeen as assignee. It appeared that Mellor issued commercial paper of the firm in large sums to be sold by J. H. Weed. The latter had $80,000 or $90,000 or more, for which the defendants claimed he had not accounted, and owed them that sum, and the defendants had also become accommodation indorsers of A. Weed & Co. for about $80,000. It appears that these transactions were not all, or only in a small part, entered on the books of Hoxie & Mellor, but Mellor kept an account of them in a small book he carried in his pocket. The amount of liabilities was swelled beyond the statement in evidence, mainly by these and similar items of paper issued to be sold for the defendants, and for which they claimed they had not received consideration, and by contingent liabilities and accommodation paper. *Hoxie* let Mellor run the business, and never paid any attention

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to it until the attachment. He lived at New London. He testified he knew that Mellor was doing a big business, and that Mellor never told him the amount of assets or liabilities until the attachment. It appears from the evidence that the books of Hoxie & Mellor were kept in a very imperfect and incomplete way. Mellor did the financial business, drew checks, made notes, sales, and purchases, etc., and reported what he did, as was necessary, as he says, for Larson to make entries on the books. Along in 1885-6-7-8 they did a business of about $300,000 a year, and in 1889 and 1890 about $500,000 a year. Did not take an account of stock and trial balances from year to year. Did not get time. Mellor testified that he supposed the statement made to the R. G. Dun & Co. Agency was true when he made it, and that he made it partly from books and partly from estimates; that he knew that credit was extended on the basis of such statements; that he got it as near right as he could. He denied knowing Van Horn, or making any statement to any one at Antigo who had called on him from Bradstreet's Agency; that he was not solicited to make any such statement, but may have talked at Antigo with some one from that agency, but not in May or June, 1890, in reference to the affairs of the firm; that they issued paper to J. H. Weed to sell to the amount of $90,000, from which they got no returns. Larson says he did enter on the books notes issued by Hoxie & Mellor when reported to him; that he never furnished Mellor with a balance sheet of the books at Antigo, and he never required one; that Mellor did not look over the books during the last four or five months, and that he did not tell Mellor what the books showed to be the condition of the firm. Up to the time of the attachment on the Ironwood property, just before the assignment, the firm had had no difficulty in meeting their obligations; that he and Mellor believed the firm able to meet their obligations.

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It was clearly shown that the statement made to the R. G. Dun & Co. Agency was very inaccurate, particularly in that the liabilities of the firm were largely understated. The expert Bartz, already mentioned, prepared a statement as shown by the books, *papers, and vouchers, etc.*, of Hoxie & Mellor, showing that the amount of their indebtedness *when the statement was made* was $479,507.34, and this did not include the accommodation paper issued to A. Weed & Co. and some other matters. He testified that the books and vouchers, etc., of Hoxie & Mellor in the hands of the assignee showed that their indebtedness, January 1, 1890, was $618,655.81; that the liabilities of the firm in June, 1890, as shown by the books and vouchers, etc., in the hands of the assignee, were $780,619.82; that the amount of paper issued by Hoxie & Mellor and indorsed by J. H. Weed during the year 1890 was $383,500. He detailed the methods pursued by him in making up his statement, and submitted elaborate statements covering many printed pages in respect thereto. This statement was made after the attachment and assignment. On the other hand, a statement by Carlton Wells as an expert was produced, differing widely from the one prepared by Bartz, compiled *from the books* of the firm, showing that the assets, November 26, 1889, the date of the statement, were $524,983.96, and the liabilities $274,697.02, corresponding in result very nearly with the statement in evidence; that their assets, January 1, 1890, appeared to be $541,183.42, and their liabilities $262,469.49,— net assets, $278,713.93; that at the time of the assignment the amount of assets, as they appeared from the books, was $635,164.47, and the liabilities $434,503.75. The assignee's report as to assets was the same, and as to liabilities $568,158.12. The testimony of the respective experts was very lengthy and elaborate, and the statements defy all attempt at condensation or examination within the limits of an opinion.

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The evidence shows that the plaintiff was quite anxious to make the sale of the Marinesco stock of lumber, amounting to about $21,000, and that the defendants were rather reluctant to purchase it. A. E. Hoxie, son of the defendant *Hoxie*, was at Marinesco when the bargain was made, and heard part of the talk, and knew that it was closed at that time; that Mellor told Curtis that he would give him $75 if he would let him back out and say nothing more about it, but did not hear Curtis reply or anything further said about it; that he thought Mellor meant just what he said, but that he was directed to scale the lumber. Another witness, Paine, said that Mellor said to Curtis he had rather give $75 if Curtis would let him off from the sale. The latter said the lumber was cheap enough, and, as he was going out of there, Mellor would make money buying it.

Evidence was offered and received tending to show that in the ordinary course of business, in making statements or reports to commercial agencies for concerns of the character and kind of Hoxie & Mellor, it was not customary to include in their liabilities accommodation paper, and also tending to show that it was a method, quite common, of raising money by issuing notes to note brokers to sell. The evidence tended to show that Mellor really believed that his firm was solvent up to the time of the attachment on the Ironwood property, and, with temporary assistance, could get over its present difficulties and go on, and also tending to show that the statement made to R. G. Dun & Co. was made in good faith, though it appears to have been a very inaccurate or mistaken one, particularly in regard to their liabilities; and the evidence tended to show that Curtis, the general manager of the plaintiff, had, in a general way, knowledge of the kind and character of the business and general business operations of Hoxie & Mellor. It does not appear that at any time in the course of its business transactions with that firm he asked them for any

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statement as to their financial condition until a few days before the assignment, and this subject does not appear to have been alluded to in any way at the time of the sale of the lumber at Marinesco for so considerable an amount as $21,000, nor does it appear that the statement to the R. G. Dun & Co. Agency was ever mentioned by Curtis to the defendants or any one else until a few days before the attachment.

The statement made by the defendants to the R. G. Dun & Co. Agency was too remote from the transaction in question, in view of the knowledge the plaintiff had of the defendants' business enterprises and methods, and of the business relations which had existed between the parties for over four years, to reasonably justify the plaintiff in absolutely relying on this representation of the defendants as a basis of credit for so large a sum, without any attempt to obtain from them or other sources further information on the subject. It was made November 26, 1889, and Curtis saw it in January, 1890, and the main transactions between the parties were about seven months after its date. Upon its face it does not seem to have been intended as a basis for the action of the plaintiff or the banks named in it, for they were the parties the defendants named as references to whom the commercial and business public might refer to vouch for the reliability of the statement and for the standing and responsibility of the defendants. When Curtis saw this paper he must have observed its obvious import in this respect, and that the plaintiff was being held out to the world as vouching for the statement in a manner that might be highly prejudicial to the interests of others. With knowledge of the character of the statement, investigation became a duty, both for the protection of the plaintiff if it expected to act on it as a basis of credit, and in fairness to protect others who might rely on it by reason of the reference to the plaintiff. It does not appear

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that it took any action on the subject, but left the matter with the sanction of its name to give credit to the statement, and it is difficult to see how it lies with the plaintiff to say that it was misled by a statement not clearly intended to influence its action, but with the aid of its sanction to influence others. Looking to the extrinsic facts, and they must be considered to judge of the probable effect of the statement on the plaintiff, in any other view, we find that there was no apparent reason for the plaintiff to require or the defendants to make any such statement, when their standing, character, and extent of their business, and general methods in which it was carried on, must have been well understood by the plaintiff in consequence of its former long-continued business relations with the defendants.

It is material to note that it does not appear that mention was ever made of this statement by Curtis, the plaintiff's general manager, to the defendants or to any one else until a few days before the attachment was made, notwithstanding so large a deal as that for the lumber at Marinesco for $21,000, and one probably out of the usual course of business, took place between them; a transaction, it appears, the plaintiff was quite anxious, and the defendants rather reluctant, to make,—so much so that they offered to give $75 to have the sale abandoned or declared off. This is certainly strong evidence to show the statement in question was not made with intent to defraud and deceive the plaintiff, or to secure or bring about a sale of the property to the defendants without an intention on their part to pay for it, or with intent to defraud the plaintiff. The statement does not appear to have been put forth as a device or means to influence any matter then in hand between the parties, or to which it had any contemplated or near relation, and there seems to have been an absence of any intention on the part of the defendants to defraud or mislead.

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It appears to have been generally held, where an untrue statement to a commercial agency is relied on to affect a transaction made on the faith of it, that it is necessary, not only to show the falsity of the representation, but that, when it has no direct connection with the transaction then depending or about to be engaged in, it must be shown that the untrue statement was wilfully or intentionally made for the purpose of procuring credit from the plaintiff; but this case does not call for a decision on this point. This view is maintained in *Macullar v. McKinley*, 99 N. Y. 353, 357, restricting the doctrine of *Eaton, Cole & Burnham Co. v. Avery*, 83 N. Y. 31. The latter case holds that it is necessary that the statement be wilfully false, and that the question is material whether the representations were such as were calculated, under the circumstances, to deceive a prudent man. *Genesee Co. Sav. Bank v. Michigan B. Co.* 52 Mich. 164, 170, 438; *Victor v. Henlien*, 33 Hun, 549, 550.

Whether the plaintiff had a right to rely upon the representations contained in the statement is not a deduction to be made from its language alone, but from all the extrinsic facts and circumstances as well, as to whether it would be liable to influence the judgment and conduct of a prudent business man. Curtis testifies, it is true, that he extended credits to the defendants on account of the statement made by them to the commercial agency, and, on redirect examination, that he relied "upon the statement he saw at the bank, *corroborated by the statement made to Van Horn.*" It is evident from the testimony of Van Horn that Curtis was interested in seeking for information about the last of May, and a short time before the Marinesco sale, as to the responsibility of the defendants. He had three conversations on the subject with Van Horn, and he learned the substance of the partial oral statement made to the latter, and that, on inquiry by him at two or three of the banks and of one Trever, he "found out that

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they were practically what they represented themselves to be." As already indicated, we think that, under the circumstances of the case, and the remoteness in point of time of the statement, he was not entitled to rely on it as a basis of credit, and if he needed any assurance on that point, or was in doubt, as his conduct tends strongly to show he was, he ought to have called the attention of the defendants to it at the time of the transaction in question, or to have obtained information elsewhere. But he did not take that course, and we are impelled to the conclusion from all the evidence that, while he recognized the necessity of further information, he relied on Van Horn's statement and the recent inquiries he had made, together with his knowledge of their standing, responsibility, and extent of their business, acquired in the course of dealing between the plaintiff and defendants for the past four years or more. The defendants, however, are not responsible in any proper sense for Van Horn's statement to Curtis. He was not their agent or representative for that purpose, nor did they make him any written statement. Van Horn was simply in the employ of the Bradstreet Agency, collecting information to enable it to rate the defendants and others, and send such ratings out to their customers in the usual way. He does not appear to have had any authority to do more, or to give it out. We do not think the defendants can be affected on this issue by Van Horn's statement to Curtis, for he had no authority, express or implied, from the defendants to make it. It was a material part of the plaintiff's case to show, not only that it had a right to rely, but that in fact it did rely, on the statement in question. This could not be presumed, and it was required to be shown by a preponderance of proof. In consequence of the statute as to the burden of proof, the defendants were not required to prove to a demonstration that it was not relied on. It was sufficient if this appeared by a preponderance of proof.

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The case shows that in respect to the affairs of the firm of Hoxie & Mellor there were bad business methods and very imperfect bookkeeping, and that they probably lost largely on account of their accommodation paper and by paper placed in the hands of note brokers for sale. The failure which occurred was a probable, if not necessary, result of a want of good judgment and business prudence in the management of a business very widely extended and of a somewhat uncertain and precarious nature.

The objection to the competency of A. E. Hoxie as a witness to give evidence of conversations with Mellor, since deceased, is clearly not well taken. A. E. Hoxie was not a party to the suit or in interest in any way whatever. Neither party claimed or derived any interest or title under or through him. The statute in respect to the competency of witnesses was intended to extend and liberalize the rules of the common law, and not to restrict them. The rule has always been that, at common law, a witness circumstanced as the one in question was competent to testify to statements or declarations made by a party since deceased. And we see no objection to this witness being asked what he heard Curtis say as to his desire to sell the lumber at Marinesco in bulk or a portion of it. Other objections to testimony admitted present no point material to the decision, and do not require consideration.

It would seem from the testimony and findings that the court below must have arrived at the conclusion that the plaintiff, under the facts and circumstances shown, was not entitled to rely, and did not in fact rely, on the statement in question, and we do not find any clear or decided preponderance of proof against this view of the case or of the finding of the circuit court. We hold, therefore, that the order vacating the attachment is correct.

By the Court.— The order appealed from is affirmed.

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McCoy, by guardian *ad litem*, Respondent, vs. Milwaukee Street Railway Company, Appellant.

May 2—May 25, 1894.

Street railway companies: Injury to person through negligence of car driver: Evidence: Special verdict: Instructions to jury: Damages.

1. In an action for an injury which permanently deprived plaintiff of the use of an arm, evidence on his behalf that he had no education or trade was admissible upon the question of damages.
2. Plaintiff's claim being that the wheels of defendant's street car in some way caught and crushed his elbow but did not run over his arm, it was not error to exclude expert testimony on behalf of the defendant as to what would have been the effect upon the arm if the car had run over it. If relevant, it was not the subject of expert testimony.
3. It being claimed that the injury was caused by the negligence of the car driver, evidence, elicited on his cross-examination, that it was part of his duty to see that passengers put their fares in the box, and that sometimes in attending to that duty he had to turn around so as to face the car, was competent to show that his attention was liable to be diverted, even though it could not be shown with certainty what was the precise situation at the time of the accident.
4. The question whether the defendant was guilty of any negligence which was the proximate cause of the injury being submitted to the jury for a special verdict, a question requiring the jury to state in what that negligence consisted was properly refused as calling for mere evidential facts.
5. A question as to whether the defendant in the exercise of ordinary care could have avoided the injury was also properly refused as being merely a repetition of the question first mentioned.
6. Where the jury were instructed as to some of the elements or facts to which attention should be given in forming their estimate of the value of the testimony of witnesses, a failure to call their attention to other elements or facts was not error, in the absence of any request for fuller or more specific instructions.
7. So, also, a failure to instruct the jury not to include in the damages compensation for plaintiff's loss of time, etc., during his minority, was not error, where no such instruction was requested.
8. Damages for mental suffering caused by serious personal injury are not special damages, and need not be specially pleaded or proved.
9. An award of $4,000 for a permanent, and almost or quite total, loss of the use of his left arm by a boy seventeen years old, is *held* not excessive.

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APPEAL from the Superior Court of *Milwaukee* County.

Action for personal injury. The plaintiff claims the facts to be as follows: That the plaintiff, a messenger boy, about seventeen years old, was riding on horseback along a street on which the defendant operated its street railway, when the horse slipped and fell; that the horse fell onto the plaintiff in such a way as to confine him to the ground, and very near to the defendant's track; that one of defendant's cars drawn by horses was coming towards the plaintiff, and distant from him about half a block, at the time when the horse fell; that the whole situation was in plain sight of the defendant's car driver; that the car was not stopped, but continued on its course past the plaintiff; that in keeping his head from under the wheels as the car passed him, his arm in some way was crushed by the wheels. The plaintiff's own testimony had some corroboration.

The defendant's theory of the accident was that the plaintiff was coming from the rear of the car; and that, while attempting to pass and get ahead of the car, his horse fell at the side of the car, and he was thrown against the car and pavement, and so received his injury without the knowledge or fault of the car driver.

There was a special verdict, with damages assessed at $4,000. There was judgment for the plaintiff upon the verdict, from which the defendant appeals.

For the appellant there was a brief by *Miller, Noyes & Miller*, and oral argument by *B. K. Miller, Jr.* They contended, *inter alia*, that the court erred in admitting evidence of the plaintiff's lack of education and that he supported himself. 2 Thomp. Neg. 1257, 1263; 3 Suth. Dam. (1st ed.), 261, 262; *Alberti v. N. Y., L. E. & W. R. Co.* 118 N. Y. 81, 82; *Stewart v. Ripon*, 38 Wis. 588. The expert evidence in relation to the effect of a street car's running over the arm of plaintiff was improperly excluded. *Louisville & N. R. Co. v. Mothershed*, 97 Ala. 261; *Watson v.*

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Minneapolis St. R. Co. 53 Minn. 551; *Andrews v. Youmans*, 82 Wis. 81. The court erred in refusing to submit the questions proposed by defendant. *Haley v. Jump R. L. Co.* 81 Wis. 412; *Selleck v. Griswold*, 49 id. 39, 49, 50.

For the respondent there was a brief signed by *W. J. Turner*, counsel, and *Turner & Timlin*, attorneys, and oral argument by *Mr. Turner*. They argued, among other things, that what would have been the effect of the car's running over the boy's arm was not a subject for expert testimony. *Seliger v. Bastian*, 66 Wis. 521; *Oleson v. Tolford*, 37 id. 327; *Lawson v. C., St. P., M. & O. R. Co.* 64 id. 447; 1 Greenleaf, Ev. (15th ed.), sec. 440, *et seq.; Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469; *Hammond v. Woodman*, 66 Am. Dec. 228; *Mellor v. Utica*, 48 Wis. 457; *Knoll v. State*, 55 id. 249. The boy's lack of education was properly taken into account in estimating his damages. *Power v. Harlow*, 53 Mich. 507; *Knapp v. S. C. & P. R. Co.* 71 Iowa, 41; *Henry v. S. C. & P. R. Co.* 75 id. 84. The damages were not excessive. *Schmidt v. M. & St. P. R. Co.* 23 Wis. 186; *Neilon v. M. & M. P. Co.* 75 id. 579; *Ketchum v. Tex. & P. R. Co.* 38 La. Ann. 777; *Schultz v. C., M. & St. P. R. Co.* 48 Wis. 375; *Sprague v. Atlee*, 81 Iowa, 1; *Mo. Pac. R. Co. v. Jones*, 75 Tex. 151; *Union Pac. R. Co. v. Young*, 19 Kan. 493; *Ridenhour v. K. C. C. R. Co.* 102 Mo. 270; *Little Rock & F. S. R. Co. v. Cagle*, 53 Ark. 347; *Sobieski v. St. P. & D. R. Co.* 41 Minn. 169; *Eldridge v. Atlas S. S. Co.* 58 Hun, 96; *Murtaugh v. N. Y. C. & H. R. R. Co.* 49 id. 456.

NEWMAN, J. The first error claimed is this: The plaintiff was permitted to testify, over defendant's objection, that he had learned no business or trade, that he had no education, and could not do office work. It was understood that this evidence was intended to bear upon the question of the amount of the plaintiff's damages. An authority cited

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by the appellant on the subject, 2 Thomp. Neg. 1257, says: "The jury, looking to all the circumstances of the case,—his former occupation, its nature, the money or other benefits derived therefrom, and the extent to which his capacity to follow that or any other calling to which he is fitted is impaired by the wrong of the defendant,— must assess his damages at a sum which will compensate him for the injury suffered." In order to be able to judge fairly how much his capacity to earn money and to get a living has been impaired, it would seem that the jury should be informed by evidence of his qualifications and capacity to follow his former or some other calling. It would seem to be competent to inform the jury by evidence what fitness he had for following his former or some other business, both before and after his injury, in order to enable the jury fairly to estimate his damages. The fact that he had no education or trade is relevant upon such an inquiry.

The second error claimed is that the defendant's expert witness was not permitted to give his opinion as to what would have been the effect upon the plaintiff's arm if the car wheels had run over it. It was not claimed by the plaintiff that the wheels did run over his arm. He claimed that the wheels in some way caught and crushed his elbow, and left him with a stiffened and comparatively useless arm. This does not seem to have been seriously disputed. It could really throw little light upon the extent of the injury, or the precise manner of its infliction, to show that the arm would have been severed if the wheels had actually passed over and across it. So the proposed evidence had little relevance. If relevant, it was not a subject for expert testimony. It is a matter of common knowledge that a car wheel passing over a man's arm which lies across the track will probably cut the arm off. The evidence could not have enlightened the jury upon that subject.

The plaintiff was permitted, over the defendant's objec-

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tion, by cross-examination of the defendant's witness the car driver, to show that it was a part of the driver's duty to see that the passengers put their fares in the box, and that sometimes in attending to that duty he had to turn around so as to face the car. This is claimed as error. Doubtless a large latitude must be permitted on cross-examination. The intelligence and memory of the witness, his opportunity and accuracy of observation, his attention or want of attention, are all proper subjects of investigation on cross-examination. This tends to make clear the degree of credence to which the statements are entitled. Whether he was in a situation to give undivided attention, or whether his attention was liable or likely to be diverted by other duties, are certainly proper subjects of inquiry. And this is none the less competent, but may be more important, in a case where it cannot be shown with entire certainty what was the precise situation at the time of the occurrence. The testimony was competent for this purpose, even if immaterial for any other purpose.

The court refused to submit in the special verdict two questions requested by the defendant. The first question which was submitted is: "Was the defendant, or its servants, guilty of any negligence which was the proximate cause of injury to the plaintiff?" The defendant asked to follow that question with this: "If you should answer the foregoing question, number one, in the affirmative, in what did that negligence consist?" This question the court refused to submit. This is the fourth alleged error. The question which was submitted included the issuable fact of the defendant's negligence. This was a material issuable fact in the case. The question proposed by the defendant is not addressed to any issuable fact in the case, but calls upon the jury to report, in their special verdict, the evidential facts from which they shall draw their conclusion of the issuable fact. It is now, since the subject

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was revised in sec. 2858, R. S., well settled that such matters have no proper place in a special verdict. "It is the province of a special verdict to determine issuable facts, and not to present fragments or a mere abstract of the evidence." *McLimans v. Lancaster*, 63 Wis. 596, 603. "Each question should be limited to a single, direct, and material controverted issue of fact, and in such a way that the answer will necessarily be positive, direct, and intelligible." *Jewell v. C., St. P. & M. R. Co.* 54 Wis. 610, 618. "The questions should embrace only the plain, distinct, and material issuable facts." *Murray v. Scribner*, 74 Wis. 602, 607; Thomp. Trials, § 2652.

The second of the defendant's proposed questions which the court refused is: "Could the defendant, in the exercise of ordinary care, have avoided the injury to the plaintiff?" It is plain that, if the question should be answered in the negative, it in effect answers the first question in the negative; for, if the defendant could not, by the exercise of ordinary care, have avoided the accident, then it was not in fault, and could not have been guilty of negligence which caused the plaintiff's injury. It is, in effect, a repetition of the first question which was submitted. It could subserve no useful purpose to repeat the question in a different form of words, while possibly the jury might fail to observe the practical identity of the questions, and might possibly give answers which should be found to be inconsistent, and so the verdict might be made ineffectual. Such results are to be avoided so far as care in forming the questions to be submitted in the special verdict can go. The question was not necessary to a complete verdict. There was no error in the refusal to submit these questions.

The fifth alleged error relates to the charge of the court. The judge instructed the jury as to some of the elements or facts to which attention should be given in forming their estimate of the value to be attached to the testimony

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of the witnesses. He did not call attention to all of the elements usually considered as bearing upon that subject; nor did he attempt to. He did call attention to some of the more important features to be considered, as arising fairly in the case. So far as they go, the instructions are not erroneous. If the defendant desired instructions more full or specific, it should have requested them to be given; otherwise the omission to give them is not error. *Austin v. Moe*, 68 Wis. 458, and the cases cited.

The same observation answers another objection to the instructions. The court did not call the attention of the jury to the fact that the plaintiff, during a part of the time while his damages were accruing, was an infant, nor instruct them not to include in the damages assessed compensation for loss of time or for impaired ability to labor during his minority. The charge on the general subject of damages for loss of time and impaired ability to labor is not complained of. No doubt the omission to instruct on this point was an oversight. The defendant should have called the attention of the court to the subject. *Stewart v. Ripon*, 38 Wis. 584.

The court also instructed the jury, as bearing on the subject of the assessment of the damages, that they should consider the plaintiff's mental suffering, caused by the accident. The objection is that such damages are special damages and are not claimed in the complaint nor mentioned in the evidence. But damages which are the natural and necessary consequences of the injury are not special damages. They do not need to be pleaded nor specially proved. They are presumed from the injury itself. The law implies that injury to the feelings follows serious personal hurts. 1 Suth. Dam. (2d ed.), §§ 419–421; *Stewart v. Ripon*, 38 Wis. 584.

The sixth alleged error is: The verdict is against the weight of evidence, and the damages are excessive. The

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court cannot say that the verdict is so clearly against the weight of the evidence as that it should be set aside on that ground. It seems to the court, rather, that the evidence fairly supports the verdict. And, in view of the precedents, it cannot be held that the damages are excessive for the permanent, and almost or quite total, loss of all beneficial use by the plaintiff of his left arm.

By the Court.—The judgment of the superior court of Milwaukee county is affirmed.

KAUFER and others, Respondents, vs. WALSH, Appellant.

May 3 — May 25, 1894.

Debtor and creditor: Fraudulent consignment: Attachment: Replevin by consignee: Court and jury: Evidence: Instructions: Verdict.

1. The question of fraudulent intent in a debtor's conveyance of his property being made, by sec. 2323, R. S., a question of fact for the jury, the judgment in such a case should not be reversed on the ground that the verdict is against the evidence, unless it is so clearly and palpably against the evidence that the refusal of the trial court to set it aside was an abuse of discretion.
2. Evidence that the persons to whom a debtor had transferred his property with attempted secrecy had engaged in other fraudulent transactions with other persons, or that it was their common course of business to receive consignments in the same way from insolvent merchants, was not admissible to show their participation in the debtor's intent to defraud his creditors.
3. In replevin by the persons to whom the debtor transferred the goods, against the sheriff who had seized the goods on writs of attachment as the property of the debtor, and who justified on the ground that the transfer was fraudulent, it was error to instruct the jury that the sheriff was only a nominal party and that the real defendant was the attaching creditor, a resident of another state.
4. An instruction in such case that the burden was upon the defendant to prove that the transfer was made with the *design* and *intent* upon the part of the debtor to hinder, delay, *and* defraud his cred-

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itors, and that plaintiffs *participated* in, as well as knew of, the fraud, and had *aided and assisted* the debtor in his design and attempt, was also erroneous.

5. It being a material question for the jury whether the plaintiffs obtained the goods in the regular course of their business, it was error for the court to say to the jury in relation thereto: "If plaintiffs have succeeded in proving these facts (about which I understand there is substantially no dispute)," etc.

6. It was error, also, to instruct the jury that it was incumbent upon the defendant to prove to their *satisfaction* and *convince* them by a *fair preponderance* of the evidence that the transfer was made with intent to hinder, delay, or defraud creditors.

7. An instruction that the party alleging fraud must prove it, that it is not to be presumed *however suspicious the facts and circumstances may be*, and that in cases of this nature *facts* must be shown in order to establish the defense, was erroneous as giving the jury to understand that positive evidence was necessary to prove fraud, in contradistinction from suspicious facts and circumstances.

8. The plaintiffs having made advances to the debtor upon the goods consigned to them, it was error to instruct the jury that, to defeat a recovery, it must be proved that the plaintiffs knew or had reason to know, at the time of making such advances, that the debtor did not intend to use such advances in the payment of his indebtedness or for the legitimate requirements of his business, or that he intended to use or dispose of such advances in such a way as to hinder, delay, or defraud his creditors.

9. The goods having been consigned to the plaintiffs to be sold on commission, and they having only a special property therein to the extent of the advances made, being about $7,600, a verdict that they were entitled to the possession of the property, of the value of $10,000, and six cents damages, was erroneous.

APPEAL from the Superior Court of *Milwaukee* County.

Replevin. The facts are stated in the opinion.

For the appellant there was a brief signed by *Williams & Friend*, attorneys, and additional briefs signed by *Williams & Friend*, attorneys, and *Moses, Pam & Kennedy*, of counsel, and oral argument by *Max Pam* and *O. T. Williams*.

For the respondents there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *J. G. Flanders*.

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ORTON, C. J. The plaintiffs, *Herman Kaufer*, *Charles Smithing*, and *S. E. Sherman*, under the firm name of Kaufer, Smithing & Co., did a commission auction business in the city of Milwaukee, and sold merchandise to the trade (wholesale), and also insolvency goods and real estate for different parties who consign to them, at public auction. Jacob Berkson & Co., wholesale merchants and jobbers of gents' furnishing goods, of the city of Chicago, consigned to the plaintiffs various lots of said goods between the 14th and 29th days of August, 1891, and the plaintiffs had received the same to be sold on commission, of the value of $10,000; and the plaintiffs had advanced on the same, at different times, the sum of $7,606.10. The said Jacob Berkson at that time was, and for some time before had been, indebted to one Aaron Feltenstein, by promissory note and checks, in two sums, of $2,500 and $6,800; and the said Feltenstein made an affidavit in which he stated, in effect, that the said Jacob Berkson had made such a disposition of his property with intent to hinder, delay, or defraud his creditors; and thereupon he procured writs of attachment to issue from the superior court of the county of Milwaukee against the said Berkson and his property, and placed the same in the hands of the defendant, who was sheriff of Milwaukee county; and the defendant, as such sheriff, levied upon and attached said gents' furnishing goods as the property of said Berkson, and then in the possession of the plaintiffs as aforesaid, and which had not yet been sold by them. The plaintiffs thereupon brought this action of replevin against the said defendant for their special interest of $7,606.10 in said goods, which they had so advanced to the said Berkson. The defendant answered, setting up said writs of attachment and the levy of the same on said goods by him as such sheriff, and alleged that the said goods were the property of said Berkson. This raised the question of fraud in the consignment of said

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goods by Berkson to the plaintiffs, which was the main issue in this case.

The testimony on the trial tended to prove the following facts: Jacob Berkson had been a wholesale merchant or jobber of gents' furnishing goods in the city of Chicago for a long time, and had become indebted to a great number of persons and in large amounts which he was unable to discharge, and was grossly insolvent. For some time before he made these consignments to the plaintiffs he had been secretly shipping away his goods to different places and persons, and his stock of goods had become reduced to the amount and value of $20,000. One Nathan Rubin Wideman, sometimes called Nat Rubin or Rubien, had been employed for some time in the store and business of Berkson. He had formerly been in business as one of the firm of Kaplin & Rubien. He had been acquainted with the plaintiffs about two years, and had made several consignments of goods to them from different concerns, and plaintiffs paid him a commission of two per cent. thereon; and, when his firm of Kaplin & Rubien was about to fail, he made a consignment to them of their goods on the same terms. Such consignments were not made in the name of the consignors, and to the names of the plaintiffs as consignees, but fictitious names were used for both, so that the goods could not be traced. Berkson and the plaintiffs were not acquainted with each other, and Rubin brought them together to make arrangements for these consignments. They were also to be made in the names of fictitious persons. *Mr. Smithing* of the plaintiffs visited the store of Berkson in Chicago, and examined his stock of goods, and estimated them at $20,000; and he was told by Rubin that Berkson was about to fail and wanted the goods shipped in fictitious names so that they could not be traced, and *Smithing* acceded to such request. The plaintiffs employed Rubin to obtain the consignment for them, and they agreed to pay

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him two per cent. commissions thereon, but this agreement was kept secret from Berkson. The boxes and packages were marked in fictitious names, and seventeen or eighteen such names were used in shipping the goods to the plaintiffs. The bills of lading were sent to them, and by them they were able to get the goods through draymen and others, and their own names would not be known. The payments were at first made by checks to Rubin, and then in cash only, so that the transaction could not be known to others; and these payments were not entered on the books of the plaintiffs, and the money Berkson received was not deposited in the bank with which he usually did his business. The said Aaron Feltenstein, the plaintiff in the attachments, suspected that Berkson was shipping away his goods or otherwise disposing of them; and he employed detectives to watch his store and see the goods packed and boxed, and then follow them to the boats and so on to the plaintiffs in Milwaukee, and thereby he made discovery of these consignments.

The jury rendered a verdict in favor of the plaintiffs, and that they are entitled to the possession of the property, of the value of $10,000, and six cents damages, and the defendant has appealed from the judgment entered thereon.

There was an immense mass of testimony, defensive and explanatory, making a printed case of over 900 folios; but, altogether, it does not seem to change the effect of this statement of facts. The case was very ably tried by distinguished counsel, and, although the main facts were few and simple, this mass of testimony, much of it remote if not immaterial, was well calculated to confuse the jury and obscure the main and simple issues of the case.

1. The learned counsel of the appellant asks this court to reverse the judgment on the ground that the verdict is against the evidence. The question of *intent* to defraud in such a disposition of his property by Berkson to the plaint-

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iffs is made by the statute a question of fact (sec. 2323, R. S.) and, as a matter of course, a question for the jury. We take cognizance of this question by an exception to the ruling of the court in refusing to set aside the verdict and to grant a new trial on the ground "(1) that the verdict is contrary to the evidence." To justify this court in reversing the judgment on this ground, there must be something more than a mere preponderance of the evidence against the verdict. The true rule in such a case is well stated by Mr. Justice PAINE in *Vilas v. Mason*, 25 Wis. 310, and is: "Where there is any construction of the plaintiff's testimony, which the jury were at liberty to give, that sustained the verdict, and the court below has refused a new trial, this court will not interfere upon the mere ground that the verdict is against evidence." This court refused to reverse the judgment and order a new trial in *Janssen v. Lammers*, 29 Wis. 88, even where it appeared to this court that there was a preponderance of evidence against the result reached by the jury. The same ruling in *Eaton v. Joint School Dist.* 23 Wis. 374. The question of intent to defraud, which is the main question in this case, being made by the statute a question of fact for the jury, adds force to the above rule. The evidence must be so clearly and palpably against the verdict as to make it an abuse of the discretion of the circuit court not to set it aside and grant a new trial, or this court would not be justified in reversing the judgment on this ground. Not wishing to express any opinion on the merits of the case, we will simply say that we do not think the evidence is such as to warrant our interference with the verdict on the merits.

2. The exceptions taken to the rejection of testimony offered on behalf of the defendant to show other transactions of the plaintiffs, claimed to be similar in character and intent to this consignment, were not well taken. Such evidence would create extraneous and outside issues, im-

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pertinent to the issue in this case. Every case must rest upon its own facts. Testimony tending to show that the plaintiffs had engaged in other fraudulent transactions, and with other persons, would be no evidence of their participation with Berkson in his intent to defraud his creditors in this transaction. Transactions of the plaintiffs which are not a part of the *res gestæ* are not material to such a case as this. *Ranger v. Goodrich*, 17 Wis. 78; *Nash v. Hoxie*, 59 Wis. 384. On the question of fraud of an assignment, evidence that the assignor had once before failed and gone through bankruptcy and settled with his creditors at thirty cents on the dollar, is inadmissible. *Scott v. Seaver*, 52 Wis. 175. And so as to the offer to show that it was the plaintiff's common course of business to receive consignments of goods in the same way and under the same circumstances from insolvent merchants. It was not error to reject such testimony.

3. Many exceptions were taken to the instructions of the court to the jury, which we are compelled to hold were well taken, and that the instructions excepted to contain errors of law sufficiently material and important to cause a reversal of the judgment and the remanding of the cause for a new trial. The main issue in this case and the law relating to it are very simple and easily and readily understood by the jury upon very brief instructions by the court. The instructions on the law should be applied to the case before the jury on the evidence, and not consist of abstract dissertations on the law of fraud. The jury should have been instructed that it was incumbent on the defendant to prove that the various consignments of goods to the plaintiffs by Berkson were made by Berkson with intent to hinder, delay, or defraud his creditors of their lawful actions, damages, debts, or demands, and that the plaintiffs, or one or more of them, knew of such intent or had knowledge of such facts and circumstances as would put a prudent man

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on inquiry, which, if prosecuted with ordinary diligence, would lead to a knowledge of such intent: (1) that Berkson made the consignments with intent to defraud his creditors; and (2) that the plaintiffs, one or more, knew that he did so with such intent. This is the law of the case. Any intelligent juryman may easily understand it. *Hopkins v. Langton*, 30 Wis. 379; *Hooser v. Hunt*, 65 Wis. 71.

First. The court instructed the jury that the defendant, *Walsh*, as sheriff, levied upon the property by virtue of writs of attachment in actions in which one Feltenstein was plaintiff, etc., and "that *Walsh* is only a *nominal* party, and that the party in interest is Feltenstein, who is the plaintiff in the actions, and that *he* defends this action as a creditor of Berkson, and claims and insists that the transfer of the property was made with intent," etc. This long instruction of the manner in which Feltenstein was interested in the case as an attaching creditor and the only party in interest, was wholly unnecessary and the jury had nothing to do with it one way or another. But this was not all. It misstated the parties to the action, and introduced a new defendant to the action, not in the record, and tended to confuse and complicate the issue and load the memory of the jury with extraneous and immaterial matter. The defendant, *Walsh*, answered that he took the goods as sheriff on certain attachments as the property of Berkson, and alleged that they were the property of Berkson. To prove that they were still the property of Berkson, the defendant, *Walsh*, introduced testimony tending to show that the disposition of the goods by Berkson to the plaintiff was fraudulent and void. It is the defendant, *Walsh*, who has answered, justifying his taking of the goods as sheriff on certain writs, and it is the defendant, *Walsh*, who claims and insists that the transfer was fraudulent; and that is all the jury had any interest in knowing. Why introduce to the jury this Chicago creditor of Berkson

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(Feltenstein) as the real defendant in this action? The parties before the jury are the parties to the action on the record. This instruction is, in effect, that this suit is not between the plaintiffs, as merchants of Milwaukee, and the defendant, *Walsh*, as sheriff of Milwaukee county, but between the plaintiffs, of Milwaukee, and one Feltenstein, a Chicago creditor, seeking to collect his claim against Berkson. If there is anything in the personal influence of the parties affecting the minds of the jury, this instruction was unfavorable and unfair to the defendant in the action. We think that this instruction was not only unnecessary, extraneous, and uncalled for, but a material error in the case.

Second. The court instructed the jury as follows: "Feltenstein, the real party in interest, defends this action as a creditor of Berkson, and *claims and insists* that the transfer of the property under consideration to the plaintiffs by Berkson, *in the way and manner in which it was done by him*, was done with the intent to hinder *and* delay the creditors of Berkson in the collection of their debts and demands due them from Berkson, *and* to defraud them, and that the plaintiffs in this action knew of the fraudulent *design* and intent of Berkson in thus transferring and *delivering* the goods to the plaintiffs *to be sold*, at the time they were received by them, *and at the time they made their advances on the property*, and that the plaintiffs had knowledge or notice of, *and participated in*, *the fraudulent transaction*, and with such knowledge of facts and circumstances in the premises, *they aided and assisted Berkson in his attempt to hinder and* delay *and* defraud his creditors, and thereby became partakers in the fraud of Berkson, and although there may have been paid an advance of money on the property when it was delivered into their possession by Berkson or his agent, *yet they are not bona fide purchasers or holders of the property*, by reason of having had

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knowledge of the intent of Berkson, *and having participated in his fraudulent scheme and* intent, *and aided and assisted him in his design to hinder and delay creditors*, and that, therefore, they acquired no title to or interest in the property, and are not entitled to hold *or obtain possession* thereof, as against the creditors of Berkson, *although they did advance money, and did pay to Berkson large sums of money, upon account of these goods, for the purposes for which they were received by them.*" It has taken this long sentence, of nearly 400 words, for the court to tell the jury what one Feltenstein claims and insists and is required to prove in defense of this action. I have taken the liberty of italicizing those parts of the instruction of matters which neither Feltenstein nor the defendant claims or insists upon, or that are necessary to prove. It will be observed that they make material and erroneous additions to the necessary elements which constitute the law of fraud. They place on the defendant the burden of proving the intent to hinder, delay, *and* defraud; the *design* as well as the intent; the *participation* in the fraud as well as knowledge of it; that they *aided* and *assisted* Berkson in his *attempt* to hinder, delay, *and* defraud *at the time the advancements were made*, as well as at the time of the transfer of the goods; and that they *aided* and *assisted* Berkson in his *design* to hinder, delay, *and* defraud. Many things are added to the law of fraud which are not only unnecessary but impossible for the defendant to prove. These erroneous instructions on the law of fraud are so interspersed with and obscured by redundant matter and surplusage as to confuse or mislead the jury.

Third. After instructing the jury as to the burden of proof on the plaintiffs, and that the plaintiffs have undertaken to prove the same, the court said that they had undertaken to show "that the goods were obtained and procured by them *in the regular course of their business*,"

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and that they made advan es, etc. Then the court said: "If the plaintiffs have succeeded in proving these facts (*about which I understand there is substantially no dispute*)," etc. Herein the court virtually rules that there is no dispute but that the plaintiffs obtained and procured the goods "in the regular course of their business." This was an important and material fact for the jury to find, and the court relieved them from it. This was a material error.

Fourth. The court also instructed the jury "that it is incumbent, also, upon such party [defendant] to prove to your *satisfaction* and *convince* you by a *fair preponderance* of the evidence" that the sale or transfer was made with intent to hinder, delay, or defraud creditors, etc. In other words, it must be proved to your satisfaction and convince you that the transfer of the property was made with such intent, but this must be done by a fair preponderance of the evidence. The jury, after they should find that such intent was proved to their satisfaction, and that they are convinced of it, must then inquire what is meant by a fair preponderance of the evidence, and they would certainly be unable to understand it. This word has no proper use in such a connection. Fraud is not to be presumed, but *clearly* proved, is all there is of it, and anything more would be likely to confuse the jury.

Fifth. The court said further: "It is a maxim of the law that the party alleging fraud must prove it. That means that it is not to be presumed, *however suspicious the facts and circumstances may be.* In cases of this nature, *facts* must be shown in order to establish a defense." The jury might well understand, from this language, that positive evidence was necessary to prove fraud, in contradistinction from suspicious facts and circumstances, however suspicious they may be. Fraud is more generally proved by suspicious facts and circumstances than in any other way. Positive evidence of *intent* to defraud is impossible.

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Sixth. The court instructed the jury that if the plaintiffs, "after having such notice or knowledge [of Berkson's intent], did not in any way aid or assist Berkson in disposing of his property, or hindering, delaying, or defrauding his creditors, then your verdict should be for the plaintiffs." This is contradictory to other parts of the charge, and clearly erroneous.

Seventh. The following instruction is clearly erroneous: "But you must also find, in order to defeat a recovery by the plaintiffs, that the plaintiffs knew, or had reason to know, at the time of making such advances to Berkson, *the latter did not intend to use such advances in the payment of his indebtedness, or for the legitimate requirements of his business, or that Berkson intended to use or dispose of such advances in such a way as to hinder, delay, or defraud his creditors, and the burden of proving such knowledge on the part of the plaintiffs is on the defendant.*" This instruction would account for the verdict having been rendered for the plaintiffs, even though the evidence of the fraud was as strong as it ever was in any case in the books. It imposes an utter impossibility on the defendant,— to prove that the plaintiffs knew what disposition Berkson was going to make of the advances or the fruits of the fraud. There is no such legal principle. This error was very material, and no doubt affected the verdict.

Eighth. To make this last instruction still more conclusive of the case, it is followed by the instruction: "And the defendant must satisfy you that they had such knowledge, by a fair *preponderance* of the evidence."

When the consignments of the Berkson goods were first received by the plaintiffs, it does not appear that they had any general property in them. They were consigned to be sold at auction on commission, and the title remained in Berkson until they were sold. When the attachments were levied on the goods, the plaintiffs had advanced on

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the goods only the sum of $7,606.10. This gave the plaintiffs only a special property in them, for which only they were entitled to recover. The court instructed the jury that the plaintiffs must "show to you distinctly what that interest or special property is." The plaintiffs did show that they had advanced only the above sum. The verdict is therefore erroneous.

On account of the above errors the judgment must be reversed and a new trial ordered.

By the Court.— The judgment of the superior court is reversed, and the cause remanded for a new trial.

OHLWEILER, Respondent, vs. LOHMANN and others, Appellants.

May 3 — May 25, 1894.

(1) *Special verdict: Character of questions.* (2, 3) *Negligence: Livery-stable keeper: Letting vicious horse: Burden of proof: Instructions to jury.*

1. Questions submitted for a special verdict should be limited to the material issuable facts, as distinguished from mere evidence.
2. In an action for personal injuries caused by negligence, it was error to charge the jury that, as there were but two versions of the facts respecting defendants' negligence,— the burden of proof as to his version being on the plaintiff, and as to their version being on the defendants,— it was immaterial, or very nearly immaterial, how the burden of proof lay.
3. In an action for personal injuries caused by a vicious horse hired from defendants, it was error to charge that unless defendants were clearly satisfied that the horse was safe without a kicking strap, or if there was reason to doubt its safety without such strap, it was negligence to let it without one.

APPEAL from the Circuit Court for *Milwaukee* County.

The complaint alleges, in effect, that the defendants were copartners engaged in the livery business at Milwaukee; that October 10, 1889, the plaintiff hired and received from

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the defendants, as such copartners, a certain black mare and express wagon, to drive upon a short journey; that without the knowledge of the plaintiff the mare had for a long time been unsafe and dangerous to drive in harness, and of vicious disposition and habit, and accustomed to kick in the harness, as the defendants well knew; that the defendants wrongfully neglected to inform or warn the plaintiff of such vicious disposition and habit, or otherwise; that without any fault of the plaintiff, and while seated upon a stationary seat upon the front of the wagon, and while on such journey, the mare suddenly and repeatedly kicked with both hind feet, and injured the plaintiff; and for the damage caused thereby he brought this action. The answer is by way of admissions, denials, and allegations to the effect that the defendants informed the plaintiff that, by letting the line negligently and carelessly get under her tail, the mare might kick in the harness, if not properly attended to and managed, and duly notified and warned him as to such habit and disposition.

At the close of the trial the jury returned a special verdict to the effect: (1) That the defendant *Blank*, when he let the mare to the plaintiff, informed him that she was a kind of a switcher, and wanted to catch the lines, but did not kick when she caught the lines, as he knew of; that she never had kicked with them; and that that was all the warning he gave at that time. (3) That the mare, at the time, was accustomed to kick so as to be dangerous, when driven in a single harness, when she did not have the lines under her tail. (4) That the defendants were aware that the mare was accustomed to kick so as to be dangerous, when driven in single harness, when the lines did not get under her tail. (5) That the mare kicked and injured the plaintiff as alleged in the complaint. (7) That the mare did not get her tail over the lines or one of them before she kicked and injured the plaintiff. (8) That the defendants were in the habit of using a kicking strap with the

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mare when she was driven in single harness, before they let her to the plaintiff. (9) That knowing what the defendants knew of the mare, her history, and habits, it was negligence on the part of the defendants to let her, to be driven in single harness, to the plaintiff without a kicking strap. (13) That the defendants had sufficient knowledge of the history, disposition, and conduct of the mare to warn them that it was not safe to let her to a customer, to be driven in single harness, without a kicking strap. (15) That, in the matter of the location of the seat, the defendants were guilty of negligence in leaving the same where it was located, which contributed to the plaintiff's injury, knowing what they knew of the habits and disposition of said mare, without providing a kicking strap for the protection of the person occupying such seat. (6) That the plaintiff was not guilty of any want of ordinary care in driving the mare, which caused or contributed to his injury. (11) That the plaintiff was not guilty of any negligence in the matter of employing competent medical or surgical assistance in endeavoring to be cured of his injury, which increased, aggravated, and prolonged his sufferings. (14) That, in the matter of the location of the seat upon the wagon, the plaintiff was not guilty of any negligence which contributed to his injury, knowing what he knew, and having been told what was in fact told him. (10) That the plaintiff's damages by reason of the injury, without reference to the skill, experience, or conduct of the physicians employed by him, were $2,000. (16) That they found for the plaintiff.

From the judgment entered upon said verdict on motion of the plaintiff, and in his favor and against the defendants, according to said verdict, the defendants appeal.

For the appellants there was a brief signed by *W. J. Turner*, of counsel, and *Rogers & Mann*, attorneys, and oral argument by *Mr. Turner*.

M. C. Krause and *Jared Thompson, Jr.*, for the respondent.

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CASSODAY, J. It is conceded that the mare was hired of the defendants by the plaintiff to drive, and that while he was driving her she kicked and badly injured him. A recovery of damages is sought on the ground that at the time of letting the mare the defendants negligently failed to fully and truly inform the plaintiff as to her known vicious habits. The simple issue thus presented was complicated to a considerable extent by submitting to the jury ten several questions respecting the same. Five of these relate to the habits of the mare when being driven with the lines, or one of them, under her tail. Four of them relate to her habits when driven without a kicking strap, and whether the defendants were negligent in allowing her to be so driven. Two of them relate to the negligence of the respective parties in regard to the location of the seat. These were all matters of evidence proper to be considered in the determination of the case. But such verdict was never designed to submit to the jury undisputed questions of fact, nor to elicit from them a mere abstract of the evidence. *Montreal River L. Co. v. Mihills*, 80 Wis. 551. The statute requires that such questions shall relate "only to material issues of fact." Sec. 2858, R. S. This would seem to limit such questions to such facts as are controverted and put in issue by the pleadings, or, at most, to such as might properly have been put in issue by the pleadings, i. e. issuable facts in contradistinction to mere evidence. These views are in accord with the repeated decisions of this court. *Heddles v. C. & N. W. R. Co.* 74 Wis. 258. Some portions of the special verdict are repugnant to the rules mentioned. So the questions which the defendants requested to have submitted were, to some extent, objectionable. Nothing here said is intended to restrict the proper exercise of the discretionary power of the trial court in the formation of such verdicts, but only to indicate the propriety of simplifying such issues, and

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thus avoiding errors which in a close case may become material, and hence ground for reversal. *Ibid.*

The jury were not required to answer the second question submitted unless they answered the first question in the negative, but they answered the first question in the affirmative, and such answer is given in the foregoing statement. The two questions are, to some extent, counterparts of each other.[1] They submitted to the jury the claims of the respective parties as to the information given to the plaintiff by the defendants as to the habits of the mare at the time of the letting. The court, in charging the jury, considered the two questions together, and in effect told the jury that the burden of proof was upon the plaintiff as to the first question, and upon the defendants as to the second, and then, among other things, said: "But, inasmuch as there are but two versions of the facts here,—the burden of proof being upon the plaintiff as to one, and upon the defendants as to the other,—it is immaterial, or very nearly immaterial, how the burden of proof lies." This is all there was said in the charge about the burden of proof, except that the jury were directed to answer the third question submitted "according to the weight of the evidence," and yet there were seven other questions submitted to the jury respecting the alleged negligence of the defendants. The real question for determination was whether

[1] The first and second questions submitted to the jury were as follows: *First.* Did the defendant *Blank*, when he let the mare mentioned in the complaint in this action to the plaintiff, inform him that she was kind of a switcher, and that she wanted to catch the lines, and that she did not kick when she caught the lines, as he knew of,—that she never had kicked with the defendants,—and was that all the warning he gave at that time? *Second.* Or, if you answer the first interrogatory in the negative, did the defendant *Blank* tell the plaintiff at that time, in substance, to be careful, and that if the mare got the lines under her tail she might kick, as he had been told, and that, if she did get the lines under her tail, not to pull upon the lines, and then she might not kick?"—REP.

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the defendants were negligent, as indicated, in the letting of the mare; and in a case like this the burden of proving that they were so negligent is upon the plaintiff, and does not shift to the defendant during the trial. *Atkinson v. Goodrich Transp. Co.* 69 Wis. 5. On the contrary, the burden of proving contributory negligence, when not disclosed by the testimony on the part of the plaintiff, is upon the defendant. *Hoye v. C. & N. W. R. Co.* 67 Wis. 15. These broad distinctions should not be lost sight of in the charge or the verdict; and yet in the charge and the verdict in the case at bar the subject of negligence and contributory negligence are commingled together, and repeatedly made to alternate with each other, thus making the error in the charge as to the burden of proof more effectual.

The court charged the jury, upon the ninth question submitted, to the effect that, unless the jury found that the defendants were clearly satisfied that the mare was safe without a kicking strap, they were negligent in letting her to be driven in a single harness without one; that, if they found that there was still reason to doubt her safety without a kicking strap, then they ought to find that it was negligent to let her without one. This was, in effect, saying, as a matter of law, upon the facts stated, that the failure to furnish a kicking strap was negligence for which the defendants were necessarily liable. This, as we think, was a clear encroachment upon the province of the jury, as indicated when the case was here upon the former appeal. 82 Wis. 198; *Kaples v. Orth*, 61 Wis. 533.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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THE STATE EX REL. SWEET and another vs. CUNNINGHAM and others.

January 15 — May 25, 1894.

School lands: Setting aside for state park: Withholding from sale: Power of commissioners to withdraw lands once offered: Lands withdrawn, when subject to private sale: Retroactive statute.

1. Lands belonging to the school fund cannot, under sec. 2, art. X, Const., be set apart by the legislature for a state park.
2. The legislature cannot withhold school lands from sale, since, by sec. 8, art. X, Const., that power is confided to the discretion of the commissioners of public lands.
3. Under sec. 8, art. X, Const., providing that the commissioners of public lands "shall have power to withhold from sale any portion" of the school lands "when they shall deem it expedient," the commissioners have power to withdraw from sale school lands which have once been offered at public sale.
4. Under ch. 222, Laws of 1885, public lands which have once been withdrawn from sale become again subject to private sale only after they have been re-offered at public sale.
5. Ch. 222, Laws of 1885, applies to lands withdrawn from sale before its passage, as well as to those afterwards withdrawn, but does not for that reason have a retroactive effect, since it operates only upon conditions existing at the time of its passage or arising afterwards, and upon sales made after its passage.

MANDAMUS to the Commissioners of the Public Lands.

The relation sets out that on June 5, 1893, the relators made application, in the manner required by law, for the purchase at private sale of certain school and swamp lands therein described; that said lands were then subject to entry at private sale; and that the application was refused by the commissioners. The return of the commissioners to the alternative writ states that a part of these lands had been withdrawn from sale and reserved for a state park by ch. 324, Laws of 1878; that all of said lands had been withdrawn from sale by an order of the commissioners made

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February 13, 1883, and were not, at the time of relators' application to buy them, subject to private sale.

It was referred to the judge of the thirteenth circuit to hear, try, and determine the issues of fact. His determination of such issues is on file in this court. It finds that all of said lands, except five forty-acre tracts, had been, prior to June 5, 1893, offered for sale at public sale, and then remained unsold; that, after they had been so offered for sale at public sale, to wit, on February 13, 1883, the commissioners made an order withdrawing all public lands from sale; and again, on April 3, 1883, made another order, declaring that all public lands which had been withdrawn from market by the former order were thereby restored to market and were again for sale; that, prior to June 5, 1893, the letter "R" had been written opposite to each tract of such lands in the books of the land office, which was understood in the office to mean that such lands were reserved from sale; and that after relators' application was received the commissioners made a formal order withdrawing such lands from sale.

For the relators there were separate briefs by *Elliott & Hickox* and *D. S. Tullar*, and oral argument by *E. S. Elliott* and *Mr. Tullar*.

For the respondents there was a brief by the *Attorney General*, and oral argument by *J. M. Clancey*, Assistant Attorney General.

The following opinion was filed January 30, 1894:

NEWMAN, J. The question of law arising upon the facts found is, Were these lands subject to private sale at the time when the relators made application to buy them?

Probably ch. 324, Laws of 1878, which declared these lands to be dedicated and set apart for a state park and forbids their further sale, has very little influence upon the question. These lands mostly belong to the school fund

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of the state. The school fund is a trust fund, and is placed by the constitution beyond the power of the legislature to divert it to any other use than the support of the schools of the state. It could not set them, or any part of them, apart for a state park. Const. Wis. art. X, sec. 2; *Lynch v. The Economy*, 27 Wis. 69; *People v. Allen*, 42 N. Y. 404. Neither could it withhold these lands from sale. That power is confided to the discretion of the commissioners of public lands by the constitution, and lies in no other office or body. Const. Wis. art. X, sec. 8; *State ex rel. Crawford v. Hastings*, 10 Wis. 525; *McCabe v. Mazzuchelli*, 13 Wis. 478; *State ex rel. Kennedy v. Brunst*, 26 Wis. 412. So the state park law has very little influence on the question.

These lands had been once offered at public sale. Afterwards, on February 13, 1883, the commissioners of public lands made an order withdrawing all the public lands from sale. This they had power to do, at least so far as concerns the school lands. Art. X, sec. 8, of the constitution reads: "The commissioners shall have power to withhold from sale any portion of such lands, when they shall deem it expedient." This action of the commissioners had the effect to withhold from sale, while in force, at least all the school lands owned by the state, including those described in the relation. Afterwards, April 3, 1883, the commissioners made another order declaring all the lands affected by the previous order to be again in market and for sale. Afterwards ch. 222, Laws of 1885, was enacted. It provides that "the commissioners of public lands are hereby authorized, at any time when, in their judgment, the public interest can be best subserved thereby, to withdraw any public lands from sale; provided that, when re-offered, the lands so withdrawn shall first be offered at public sale, such public sale to be advertised and conducted, in all particulars, in the same manner as public sales are now held."

A defect in the system of disposing of the public lands

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was supposed to be disclosed by the decision of this court in *State ex rel. Holston v. Commissioners*, 61 Wis. 274. In that case it was held that, under the statute as it then was, all public lands which have been once offered at public sale and remain unsold are thereafter subject to private sale at the minimum price, and cannot be withdrawn from sale by the commissioners of public lands. The lands involved in that case were school lands. The provision of the constitution above cited seems not to have been recalled to the mind of the court. At least the provision is not referred to in the opinion of the court, nor in the briefs of counsel. The opinion goes entirely upon a construction of the statute as it then was. It was a mistake, as to school lands at least. The defect in the system for the disposal of the public lands, which became apparent by this decision, was that the statute seemed to defeat altogether the beneficial purpose of the constitution in giving to the commissioners discretion to withhold school lands from sale; and, as to all public lands, it deprived the state of all chance of advantage from the rise in value of public lands consequent on the increase of population and the development of the country in districts where the public lands lie. The statute seemed to compel the sale of the public lands, at the minimum price, to the first applicant, regardless of their real value. This prospective rise in value was doubtless the more common and important purpose in withholding the lands temporarily from sale. The act of 1885 was doubtless enacted to remedy this defect. The first clause of the act confers no new power upon the commissioners, so far as relates to the school lands. The commissioners had always had power to withhold the school lands from sale whenever they deemed it expedient, under the provision of the constitution above cited. But it did confer upon the commissioners a new power to withdraw from sale public lands other than the school lands. The last clause or proviso of the

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act did change the statute in a very important particular. It withdrew from private sale all public lands which had been once withdrawn from sale by the commissioners, by providing that they should not be again re-offered for sale until they have been again regularly advertised and offered at public sale. This remedy seems to be sufficient to cure the evil. At least, it seems to give the state a chance to derive advantage from such rise in the value of the public lands as may accrue while they are withheld from market, through competition between rival bidders at a public sale. This will, no doubt, be more to the advantage of the public than a compulsory sale, at private sale, at the minimum price, to the first applicant.

There is no question of the power of the legislature to direct the manner in which the public lands shall be sold. It may direct whether they shall be sold at public sale or at private sale and upon what notice. As to school lands, art. X, sec. 8, of the constitution provides: "Provision shall be made by law for the sale of all school and university lands after they shall have been appraised." It does not appear by the finding whether the school lands mentioned in the relation have been appraised. As to lands other than school lands, there is no constitutional direction. This statute is remedial. It is to be construed liberally, to advance the remedy intended by the legislature. As the law was then understood, the public lands were then subject to compulsory sale at the minimum price. All had been once withdrawn from sale by the order of the commissioners, February 13, 1883. The act was intended to apply to such lands as had been withdrawn from sale before its passage, and not alone to such as might be withdrawn after its passage. Else the remedy must fail, in great part, to cure the evil. Besides, the act being a part of the system which the legislature has provided for the disposal of the public lands, it is *in pari materia* with all other statutes

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upon that subject. It is implied that a code of statutes relating to one subject is governed by the same spirit and is intended to be consistent and harmonious. "All statutes *in pari materia* are to be read and construed together as if they formed parts of the same statute and were enacted at the same time." Potter's Dwar. Stats. 145, American rule 17; *Storm v. Cotzhausen*, 38 Wis. 139; *Smith v. People*, 47 N. Y. 330, 339; *Eldred v. Sexton*, 19 Wall. 189. The plan now is that all lands which have once been withdrawn from sale become again subject to private sale only after they have been re-offered at public sale. With this construction the plan is consistent and harmonious and furnishes the remedy intended.

The lands described in the relation had been withdrawn from sale by the order of the commissioners of February 13, 1883. It does not appear that they had been re-offered at public sale, as directed by the act of 1885. They were not subject to private sale on June 5, 1893.

By the Court.— The peremptory writ of *mandamus* is denied.

Upon a motion for a new trial, counsel for the relators contended: *First.* That the conclusions arrived at by this court improvidently reverse a judgment of this court of long standing and hitherto unquestioned authority (*State ex rel. Holston v. Commissioners*, 61 Wis. 274). *Second.* That ch. 222, Laws of 1885, is not retroactive, because (1) it is plainly prospective in its phraseology; (2) the general usage for many years has been to treat it as prospective only; (3) it was not necessarily retrospective if enacted as a curative law; (4) if considered as retroactive it is unconstitutional, in that such a construction antagonizes vested rights and deprives a department of the government of a portion of its constitutional functions.

The following opinion was filed May 25, 1894:

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NEWMAN, J. The relators' attorneys have misapprehended, in some respects, the decision in this case. It is not obnoxious to all the criticisms made upon it.

It is observed by counsel that neither counsel in the case called in question the proper construction of ch. 222, Laws of 1885, and hence that the court was not asked to construe it. Nevertheless, the court felt called upon to construe it. It seemed to the court that the proper construction of that statute was the key to the situation. The construction of that statute being settled, the whole case is open and clear. The court held that that statute was "intended to apply to such lands as had been withdrawn from sale before its passage, and not alone to such as might be withdrawn after its passage." All else of the decision is but the corollary from that construction. This construction of the statute was required upon well-established canons of construction. It makes the remedy intended by the legislature effectual. This construction does not, as counsel urges, give the statute a retroactive operation. It operates only upon sales of the public lands which may be made after its passage, and then only upon lands which had been offered for sale and withdrawn at the time of its passage, or such as should thereafter be offered and withdrawn. It operates only upon a condition existing at the time of its passage, or arising afterwards. This is not retroaction. It does not disturb any vested rights.

Nor is it strictly accurate to say that the decision reversed or overruled the case of *State ex rel. Holston v. Commissioners*, 61 Wis. 274. The decision certainly does not overrule it, in terms. That case was not in point. It in no way conflicts with the decision in this case. What was thought to be an oversight or mistake was pointed out. That is all.

It is true that, etymologically, there is a difference in the meaning of the words "withhold" and "withdraw," which

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counsel, with a nice philological acumen, makes clear. But, in the construction of statutes, words are taken in their more ordinary and popular meaning, without too great refinement or research into their etymology. As applied to this subject matter,— the right of the commissioners to decline to sell the public lands,— it would make little difference, in the common apprehension, whether it should be said "the commissioners may withhold the land from sale," or whether it should be said "the commissioners may withdraw the lands from sale." It obviously comes to the same thing in the end. The lands are not sold; and that is the result which the lawmakers intended by either form of words. They intended to give the commissioners the right to decline or refuse to sell the lands. The argument of counsel has not convinced the court that the decision is wrong.

By the Court.— The motion for a new trial is denied.

THOMAS and others, Appellants, vs. THOMAS, Executor, and others, Respondents.

May 4 — May 25, 1894.

Estates of decedents: Setting aside final settlement: Assignment of estate to person claiming to be widow: Fraud: Concealment of prior marriage: Laches of heirs.

1. In a proceeding to set aside the final settlement of the estate of a decedent on the ground that the person to whom, as his widow, the estate had been assigned had never been his lawful wife and had fraudulently procured such assignment, it is *held*, upon the evidence, that there had been no concealment or misrepresentation by her of the facts relating to her prior marriage; and, it appearing that before she married the deceased she had obtained a judgment of divorce from her prior husband in a court of competent jurisdiction, which judgment was fair on its face and was believed

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by her to be valid, it was not fraud for her, relying on such divorce, to state that she was the lawful wife of the deceased, even though such divorce was in fact invalid.

2. The petitioners, the heirs at law of the deceased, knew or had heard rumors of the former marriage of the widow, but took no steps to prevent the assignment of the estate to her, and apparently made no inquiries until more than five years later and after her death. The testimony tending to show that they obtained any knowledge of the facts after her death was very slight. *Held*, that if ignorant of the facts at the time of the settlement of the estate, they were negligently ignorant, and that they had been guilty of laches which would preclude their obtaining the relief sought.

APPEAL from the Circuit Court for *Grant* County.

This was a proceeding in the county court of Grant county to vacate and set aside the settlement and final order of distribution of the estate of James Thomas, deceased, to his widow, Susan J. Thomas, on the ground that she was never his lawful wife and had fraudulently procured an assignment of said estate to her. The petitioners are the brothers and sisters of said James Thomas, deceased, and his sole heirs at law. The petition states substantially that James Thomas died July 18, 1883, intestate, without issue or parent, leaving an estate in Grant county worth over $30,000; that in September, 1883, Susan J. Thomas, his alleged widow, was, on her own petition, appointed administratrix of the estate, and that she duly qualified and settled such estate, and on the 7th of November, 1884, rendered her final account of her administration; and that on December 9, 1884, a final order was made by said county court, settling said estate and assigning the whole thereof to said Susan J. The petition further states, substantially, that the said Susan J. was not the widow of said deceased, but falsely represented herself to be such widow in order to deceive the court and procure such final order; that in fact said Susan J. was in November, 1857, duly married to one Magee, in Ohio; that she came to Grant county in the

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year 1860, representing herself to be a single woman; that said Magee is still living, and that Susan J. was never divorced from him; and that said Susan J. died February 8, 1890. The petition also states that the petitioners had no knowledge of the marriage of Susan J. to Magee, and believed her to be a single woman when she married the deceased, and did not acquire such knowledge until after the death of said Susan J.; that said Susan J. died testate, bequeathing all her property to the defendants, and that her will has been duly proven; that the defendant *Joseph P. Thomas* has duly qualified as executor thereof and is now acting as such. The relief prayed is that the settlement of the estate of James be vacated and annulled, and that the executor of Susan J. account for all her estate, and pay it into court; and that an administrator of the estate of James be appointed to take charge of and resettle said estate.

The defendants answered the petition by a general denial, except that they admitted Susan J.'s prior marriage to Magee, but alleged that she was duly divorced from him, before marrying James, by a decree of the court of common pleas of Lorain county, Ohio. As a separate defense the defendants also pleaded the proceedings and final order in the county court of Grant county in the matter of the settlement of the estate of James Thomas.

Judgment was rendered against the petitioners in the county court of Grant county, from which they appealed to the circuit court of said county.

The evidence in the circuit court showed substantially the following facts: That, for some years prior to 1865, James Thomas was an unmarried man, residing in Grant county, Wis., and that he continued to reside there until his death in July, 1883; that, in 1857, Susan J. Richmond, who afterwards married said James Thomas, was duly married to Lewis Magee in Cuyahoga county, Ohio, and that

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they lived together as husband and wife until some time in 1858, when they separated, and never thereafter lived together; that Susan J. continued to live in Ohio with her relatives until some time about the year 1860, when she came to Wisconsin, and lived for a time with one John White, her cousin, in Grant county, in the immediate neighborhood of the residence of James Thomas; that she was known when in Wisconsin by the name of Susan J. Richmond; that James Thomas commenced to keep company with her, and became engaged to marry her; that she returned to Ohio at some time prior to her marriage to James Thomas, and, while in Ohio, commenced an action for divorce against Lewis Magee, and procured a judgment of divorce by default at the October term, 1864, of the court of common pleas of Lorain county, Ohio; that she returned to Wisconsin June 7, 1865, and within two or three days thereafter was married to James Thomas, and lived with him as his wife in Grant county from that time until the death of said James Thomas; that said Lewis Magee was living at the time of the trial of this action, and had never obtained any judgment of divorce on his part; that James Thomas died July 18, 1883, without children or parents, leaving the petitioners, his brothers and sisters, as sole heirs at law, unless Susan J. was his heir by reason of being his lawful widow; that Susan J. instituted and prosecuted proceedings in the county court of Grant county, Wis., to settle the estate of said James, in which proceedings she represented that she was the lawful widow of said James, and that a final order was made in such proceedings, assigning to her the estate of said James, in December, 1884; that said Susan J., by her last will, devised the property received by her from James Thomas to the defendants, and that *Joseph P. Thomas* was appointed and duly qualified as executor of such will, and still is such.

This proceeding was commenced by the filing of the pe-

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tition in the county court of Grant county, January 10, 1891. The record of the divorce action and judgment in Ohio was offered and received in evidence; also certain sections of the statutes of Ohio, by which it appears that an applicant for a divorce must be a resident of the state at least one year next preceding the filing of the petition for divorce. There was a sharp contest in the evidence as to the time when Susan J. returned from Wisconsin to Ohio prior to her marriage with James. The respondents' testimony tended to show that she returned in 1862 or 1863, considerably more than a year before she made her application for a divorce in Ohio. The appellants' evidence, on the other hand, tended to show that she did not return to Ohio until 1864, a few months or weeks previous to the filing of her application for divorce. On this ground it was contended by appellants that the Ohio divorce was utterly invalid, and that Susan J. knew that fact.

The circuit court made findings to the effect that the proceedings in the Ohio divorce suit were in accordance with the statutes of the state of Ohio, and that the Ohio court having in that action determined that it had jurisdiction, and that said Susan Magee was a resident of the state of Ohio and had been such for one year next preceding the commencement of said action, "this court will assume that such findings and determination of said court of common pleas of Lorain county, Ohio, was correct, and this court will not undertake to determine as an original question, upon the proofs adduced in this court, whether said Susan was or was not in fact a resident of the state of Ohio at the time of the commencement of such divorce suit and for one year next prior thereto." The circuit court also found that Susan was the lawful widow of said James, and as such was his sole heir at law and entitled to his entire estate; and thereupon affirmed the judgment of the county court. From this judgment the petitioners have appealed.

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For the appellants there were briefs by *H. D. York*, *Orton & Osborn*, and *S. H. Taylor*, and oral argument by *S. H. Taylor* and *P. A. Orton*. To the point that parties are not required to act on mere rumor, they cited *O'Dell v. Burnham*, 61 Wis. 570; *Parker v. Kane*, 4 id. 16; *Lamont v. Stimson*, 5 id. 447; *Buttrick v. Holden*, 13 Met. 357.

For the respondents there was a brief by *A. R. Bushnell* and *W. E. Carter*, and a separate brief signed by *Bushnell & Watkins*, attorneys for *Jos. P. Thomas*, executor, and *Ed. M. Lowry*, attorney for *Martha E. Barnes;* and the cause was argued orally by *W. E. Carter*, *A. R. Bushnell*, and *R. A. Watkins*.

WINSLOW, J. We do not deem it necessary to decide whether the circuit court was right in determining that the Ohio judgment of divorce was valid and binding. We are satisfied that the judgment in this proceeding was right and must be affirmed, for the reason that the final judgment of distribution of the estate made by the county court of Grant county was conclusive and cannot be set aside on the facts shown in evidence. The power of the county court to vacate a final order shown to have been procured by fraud is well settled in this state. *Estate of Leavens*, 65 Wis. 440. Such a proceeding is in the nature of a bill in equity to relieve against a judgment at law. The relief will be granted when the former judgment is inequitable, and the defendant was ignorant of the fact in question pending the former suit, or was prevented from making his defense by fraud, accident, or the acts of the opposite party, unmixed with negligence or fault on his part. *Stowell v. Eldred*, 26 Wis. 504; *Tucker v. Whittlesey*, 74 Wis. 74; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332. It is obvious that the ignorance of fact which will afford ground for relief must not be intentional or negligent ignorance; otherwise, a party might wilfully remain ignorant

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pending an action, and make no investigation of the facts on which he knows his rights must depend, and afterwards invoke such negligent ignorance as a ground for setting aside the solemn judgment, long since rendered, of a court of competent jurisdiction. Such a result is not to be tolerated. Whether, therefore, we regard this proceeding as founded upon fraudulent concealment of fact by Mrs. Thomas or mere ignorance of fact by the petitioners pending the settlement of the estate, in either case, if their failure to defend was wholly or partially the result of their own intentional or negligent ignorance of fact, they cannot now be granted relief.

First, then, as to the alleged fraud on the part of Mrs. Thomas. It is claimed by the petitioners that she deliberately concealed the fact of her prior marriage and divorce in Ohio, and that the petitioners never knew of these facts until after her death; that this divorce was void, because she had not resided in Ohio for a year prior to the decree, and that she knew this fact; that nevertheless she represented herself as the lawful widow of James Thomas in the proceedings to settle his estate, and thus secured the making of the final order assigning to her the whole estate. The difficulty is that most of these alleged facts are not proven by the evidence. The circuit court refused to find that Mrs. Thomas concealed the fact of her prior marriage to Lewis Magee, and the evidence entirely justifies that refusal. It is true the evidence shows that she resumed her maiden name after her brief dream of married bliss with Magee was over and they had separated, but this is not unusual or unnatural. Aside from this circumstance, there is no tangible evidence of concealment. There is absolutely no evidence of any denial or untrue statement as to her former marriage or divorce made by her, or by any one to her knowledge, either to petitioners or to any one else. The evidence shows very clearly that it was common talk

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and rumor in the neighborhood that she had been previously married and divorced. Mrs. Ritter, one of petitioners' witnesses, says that in 1865 the rumor "was that she was married; that she was divorced; and that she was not divorced, but that her husband was dead;" and that she talked the rumor over with *Henry Thomas* within five years after the marriage of Susan to James. Mrs. Vedder, another of petitioners' witnesses, states that "it was reported in the neighborhood that she went to Ohio for the purpose of getting a divorce from her husband, whose name was Lewis Magee." From another witness it appears without dispute that in the spring of 1864 one Sigsby reported around the neighborhood her marriage to Magee, and that he had seen Magee in the army. It also appears without dispute that she told John Barr, a neighbor, in 1862 or 1863, all about her marriage with Magee; that she told Mrs. Loomis, in 1864, that she was going to Ohio to get a divorce from her husband, so she could marry Thomas; and that she told other witnesses that she was going back to Ohio to get a divorce from her husband, and that Mr. Thomas was furnishing the money for the purpose. All of the witnesses to these facts were immediate neighbors. It is also clear from the evidence that James Thomas himself knew of her marriage to Magee and of her divorce before he married her. There seems to have been no concealment made or attempted. On the contrary, it was neighborhood talk of the kind that spreads with great swiftness. That the immediate relatives could remain ignorant of it is well-nigh incredible. It is certain that two of the petitioners did not remain ignorant of it. *Mrs. Hillary*, a sister of James, testifies that her father told her twenty-three years ago that Susan was married before she married James, but she did not believe it; and *Henry* testifies that Mr. Barr told him sixteen or seventeen years ago that she had been a married woman, but that her husband was dead. There

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is also evidence of other witnesses that *Mrs. Hillary* and *Henry Thomas* had greater knowledge of the facts than they now admit. But we shall not pursue the testimony on this subject further. It satisfies us entirely that there was no concealment or misrepresentation of the facts made or attempted by Susan either before, at the time of, or after, her marriage to James.

But it is said that Susan was guilty of a fraud in representing, during the settlement of the estate of James, that she was the lawful widow of James, when she was not such in fact, because the decree of divorce from Magee was invalid. As we have before said, we do not deem it necessary to determine the validity of that decree. It is attacked on the ground that Susan had not resided for a year in Ohio when the action was instituted, and much evidence, *pro* and *con*, on this subject was introduced at the trial. It was the decree of a court of competent jurisdiction, and perfectly fair on its face. Susan undoubtedly believed it to be a perfectly valid release from her marital vows to Magee. Whether it was valid or not was a question of law rather than of fact, and one of which Susan could not be expected to have any knowledge. Under these circumstances, can it be called a fraud if she relied upon it, and, so relying, stated that she was the lawful wife of James? We think not; and in the utter absence of any evidence showing any misstatements of fact, or any artifice or device to prevent investigation or to throw any persons interested off their guard, we do not hesitate to hold that there was no fraud shown on the part of Susan in obtaining the final decree in the county court.

Having thus disposed of the alleged fraud, we come to the question whether there was such ignorance of fact on the part of the petitioners, without their fault or negligence, which entitles them to relief. We think this question must be answered in the negative. The sole question

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in the administration proceedings, on which the rights of Susan as well as the petitioners depended, was the question whether Susan was the lawful wife of James; and the petitioners must have known that this was the question. As we have said before, it is well-nigh incredible that the immediate relatives were ignorant of the common neighborhood reports as to Susan's previous matrimonial venture, and two of them substantially admit that they were informed of the principal fact years before the death of James. Notwithstanding all this, however, they allowed the probate proceedings to proceed without any action. They did not even make an inquiry, apparently. They were personally summoned to show cause why the final order of distribution should not be made, and they still remained silent and inactive, and so continued for more than five years, till the lips of Susan also had been sealed by death. Great activity seems then to have broken out in the camp of the petitioners, who, singularly enough, had not been remembered in Susan's will. But we think this activity commenced entirely too late. If they were ignorant, we think, under the circumstances here present, they were negligently ignorant. They were of full age, and we think were fairly put on inquiry by the facts within their knowledge during the administration proceedings. The testimony which tends to show that they obtained any knowledge of facts after Susan's death which they did not have before is of the slenderest kind. They claim that they were told of the former marriage, and that there had been no divorce, by Mr. and Mrs. Wildman. Both these persons denied having given any such information. We think, under well-established rules, the petitioners must be held guilty of laches. *Rogers v. Van Nortwick*, 87 Wis. 414, and cases cited in that case. They might and ought to have made the discovery long before. Not having made any inquiry, even of Susan herself, when they ought to have

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made it, they will not be allowed to make it six years later, when the opposing party is dead and the main source of evidence thereby cut off, and thus overturn a judgment rendered without fraud and on due and personal notice to all. No decision of this court authorizes relief in such a case, nor do we think it is authorized by any well-considered authority.

The record of the Ohio divorce proceedings was objected to as not properly authenticated. We regard the authentication as sufficient.

The view we have taken of the case renders unnecessary any discussion of other questions. Upon the whole record we are satisfied that the judgment below was right.

By the Court.— Judgment affirmed.

STONE, Administratrix, Respondent, vs. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Appellant.

May 4 — May 25, 1894.

(1) *Railroads: Ejection of would-be passenger from freight train.*
(2) *Evidence: Physicians and surgeons: Statements of patient.*
(3) *Punitory damages: Error, when cured.*

1. The conductor of a freight train prohibited from carrying passengers was acting within the scope of his authority in compelling a would-be passenger to leave the train, and the railway company is liable for injuries to the latter caused by his ejection while the train was in motion so that it was dangerous for him to get off.
2. In an action for personal injuries, a physician who had before been treating the plaintiff, and who was consulted by him on the day after the accident for the purpose of obtaining treatment, may testify to symptoms then existing, although he cannot distinguish between what he himself observed and what the plaintiff told him, and it appears that the plaintiff already contemplated suit.
3. An error in allowing the jury to find punitory damages is cured where the compensatory and punitory damages are assessed separately and the latter are afterwards disallowed by the court.

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APPEAL from the Circuit Court for *St. Croix* County.

This action was brought by the plaintiff's intestate, Jefferson Stone, for the recovery of damages for being unlawfully, forcibly, and violently ejected from a train of cars of the defendant, whereby he was pitched forward onto the ground, injuring his left side and foot and injuring him internally, and while the train was moving at an alleged rapid rate of speed. The train in question was a through freight train, prohibited by orders from carrying passengers. The intestate boarded said train at North Wisconsin Junction, to go to the city of New Richmond. The answer was, in substance, a general denial.

Considerable testimony was given for the purpose of showing that the train in question frequently carried passengers, and that Stone was encouraged to attempt passage thereon by the acts, declarations, and conduct of certain employees of defendant, but who were not connected with and had no control or management of the train. Various exceptions arose in regard to this branch of the case, but, for the purposes of the decision, it may be assumed that plaintiff's intestate did not become a passenger or acquire the rights of such on the train in question.

The testimony on the part of the plaintiff was to the effect that after the train had started from North Wisconsin Junction, and proceeded half or three quarters of a mile, the conductor came into the caboose where the plaintiff was, and asked him where he was going, to which he replied "To New Richmond." The conductor responded: "No, sir; not on this train. You can't go on this train, and I want you to get off, and get off now, too." That plaintiff's intestate stated he could not get off then, the way that the train was running; that if he slacked it up, so he could get off, he would do so without any trouble. The conductor said, "You can get off, and I want you to get off, and right off, too;" and kept urging him towards

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the door, and out onto the platform. That he tried to talk to the conductor, but he would not let him and was bound he should get off. So he went out on the right-hand side of the car behind, got down on the steps, and the conductor says, "Come, jump;" and, as he said that, the intestate jumped off into the ditch on the side. That one of his feet struck a rock or something hard, and it cramped him down on his side, so that he caught with his left hand to keep from falling. That it hurt his stomach and chest. That he felt a sharp pain in his stomach and left side, and hurt his ankle, too. That the train was going pretty fast. That they were then about a mile from the junction. There was testimony tending to show that the train was going at the rate of from six to eight miles an hour. That the conductor seemed "to be real fierce and ugly and mad because I was on there, for some reason or other." That intestate walked back to the junction, went to New Richmond on the same day, and thence home. That he felt pretty lame and sore. His stomach pained him considerably, and, after he had been to bed an hour or two, felt pretty bad; pain in the stomach, sick, got up and vomited, and went back to bed again; pained him all night, and in the morning was about the same; could not retain his breakfast, and that morning went to New Richmond to see Dr. Wade.

Other testimony was given as to the character and extent of his injuries. Dr. Wade, a practicing physician, testified to having treated the plaintiff's intestate for stomach trouble about a month or more before the accident, during which time he had improved. Objection was made to his stating his condition at the time; that his testimony on the subject was incompetent, the doctor having stated that it was hard for him to distinguish between the objective symptoms, or those ascertained by his personal examination, and the subjective ones, communicated by the statements of his patient. He said that his objective symptoms

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were marked tenderness in the region of the stomach. The court allowed the witness to state, against the defendant's objection, what the plaintiff's intestate complained of at that time; and he testified that he had great tenderness in the pit of the stomach and pain upon pressure, extending through it and underneath the left shoulder blade. He had been vomiting frequently through the night, and had general symptoms of indigestion, acute gastric inflammation, uneasiness in the stomach, and was disabled at that time for work. He stated that many causes might produce that condition, as a blow, a wrench, or strain; that his condition might have been the result of a sudden jerk or wrench. The court ruled that the patient's statements to the doctor, made since the action was commenced, could not be received in evidence, but admitted his previous declarations to him as to his symptoms. Dr. Wade further testified that the condition grew into one of chronic gastritis of the stomach, and there had been a slight enlargement of it, and a tenderness more or less marked. "Leaving out Mr. Stone's statements to me, I could see a change in his condition between the 21st of September and the prior examination. His pulse was quick, and he was pale, as a man would be from being sick at the stomach. There was tenderness in the stomach. The vomiting might have been caused by indigestion, and also the paleness and quickening of the pulse, if it resulted in vomiting." Testimony was given showing that he appeared to have been out of health since that time, looked pale, and at times could not work.

The court overruled the motion for a nonsuit. The statement of plaintiff's intestate as to what occurred when he jumped off the train was corroborated in important particulars by the testimony of a lady, a Mrs. Aschew, who was riding in the caboose under a special permit. She said the conductor "spoke very decidedly about his getting off, and insisted on his getting off. The conductor told him

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again that he must get off, and, before getting off, I heard the conductor say, while on the platform, 'You can get off.' The conductor seemed very decided about having the man get off. He was not rough and boisterous or insolent in manner, did not use bad language, and I do not remember that he put his hands upon the man or touched him. It appeared that the man seemed very reluctant about getting off when the train was moving, and the conductor seemed very firm about his getting off. I could not say how fast the train was moving, but not as fast as it moved later."

The conductor testified that Stone tendered him a dollar for fare, and told him to put it in his pocket and say nothing about it. That he told him that he could not do it, it was against the rules, and that he would have to get off the train. That he went towards the rear door of the caboose. Stone followed him out; stepped down on the steps of the rear platform. That he said to him: "Hold on; don't attempt to get off here until this helping engine lets go,"—to which he replied: "Well, I don't believe I can get off any way. You are going too fast." The conductor replied: "That is an old canard. Every person that gets on, that is their card. I don't ask you to get off. It don't take but a few minutes to stop the train, which I will do." That the helping engine let go, and he put one foot and his hand upon the railing to go upon top of the caboose; and Stone stepped off, and said that he would make it good and hot for the conductor for putting him off the train. "I didn't see him jump at all. He merely stepped off. He had hold of the front railing of the car when he stepped off."

Stone told the operator at the North Wisconsin Junction, ten or fifteen minutes after he had been put off, that he believed he would go to Hudson, where he had some friends, and see whether they had a right to put a man off

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any place they were a mind to; that he thought he would bring a suit then. Defendant's counsel moved to strike out the testimony of the witness Dr. Wade in respect to his conclusions and opinion as to the condition of Stone on the day after the injury, in so far as it appeared from the evidence that the conclusions and opinion were based upon statements made to him by Stone, on the ground that he had it in his mind at the time he made the statements to bring a suit against the company to recover damages. The court denied the motion and said the jury could take that subject into consideration in weighing the doctor's testimony; that if the statements so obtained were made, not for the purpose of obtaining treatment, but getting information out of the doctor, they would consider that in weighing the doctor's opinion.

The circuit judge instructed the jury that if Stone was properly a passenger the conductor had no right to put him off; that if he was not he had such right; that another question they should consider was "whether the conductor used due and proper caution in putting the plaintiff off the train; that if they found that he did, and the plaintiff was not a passenger on the train, of course the conductor had a right to put him off, doing it in a proper way and using proper care; but if they found that the conductor did not use proper caution, but compelled plaintiff to get off against his will, while the train was in motion so it was dangerous for him to get off, and that as a result the accident occurred from which the plaintiff received injuries, it would be their duty to find for the plaintiff;" that "if they found that he was not a passenger, and was ordered off negligently, while the train was moving at a rate of speed making it dangerous to get off, and plaintiff was injured by such negligence of the conductor, in either of these cases they would find for the plaintiff." The law with regard to compensatory and punitory damages was stated to the

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jury, and they were directed, if they found any punitory damages, to state the amount separately.

The jury found a verdict for $1,000 compensatory damages, and $500 punitory damages. On motion for a new trial, the verdict as to the punitory damages was set aside, and judgment entered in favor of the plaintiff for $1,000 compensatory damages, from which the defendant appealed.

Solon L. Perrin, for the appellant, contended, *inter alia*, that as the statements to Dr. Wade were made when plaintiff's mind was engrossed with the idea of recovering damages for his injuries, the same rule ought to apply that would apply if the action had been actually commenced. *Abbot v. Heath*, 84 Wis. 314; *Stewart v. Everts*, 76 id. 40; *Kreuziger v. C. & N. W. R. Co.* 73 id. 158; *Quaife v. C. & N. W. R. Co.* 48 id. 513; *Vosburg v. Putney*, 78 id. 84, 85; *Bennett v. State*, 57 id. 69, 81, 85; *Noonan v. State*, 55 id. 258.

For the respondent there was a brief by *Smith & Oakes*, and oral argument by *H. H. Smith*. To the point that the testimony of Dr. Wade was admissible, they cited Rogers, Exp. Test. (2d ed.), par. 47; *Quaife v. C. & N. W. R. Co.* 48 Wis. 525; *Barber v. Merriam*, 11 Allen, 322, 324.

PINNEY, J. 1. There was sufficient evidence to warrant the submission of the case to the jury, under the instructions of the court, to find whether the conductor put the plaintiff's intestate off the train in a proper way and using proper care; that if the conductor did not use proper caution, but compelled him to get off against his will, while the train was in motion so that it was dangerous for him to get off, and as a result he received injuries, it would be their duty to find for the plaintiff, whether he was a passenger or not. And the evidence was sufficient, in our opinion, to sustain the verdict of the jury against the defendant in this aspect of the case. The conductor was engaged at the time in the

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transaction of the defendant's business, in the management and control of the freight train in question, and which did not carry passengers. He was acting within the scope of his authority at the time, as conductor of the train, so that the defendant company was plainly liable for any injuries sustained by the plaintiff's intestate by reason of any imprudent, reckless, or wanton conduct on the part of the conductor in compelling him to leave the train, or by putting him off while it was in motion and under circumstances which rendered it imprudent or dangerous to do so. *Holmes v. Wakefield*, 12 Allen, 580; *Rounds v. D., L. & W. R Co.* 64 N. Y. 129. If Stone had no right to be on the train, as a passenger or otherwise, he was not thereby put beyond the protection of the law, or subject to be removed or compelled to leave the train in an improper manner or under circumstances of such difficulty or peril as to endanger his personal safety. The charge of the court in this respect was clearly just and proper. Conductors, while intrusted with very considerable power and control over persons coming upon their trains, are bound to exercise their authority of removal in a reasonable and prudent manner, and with a proper regard to the safety of even those not lawfully on their trains as passengers.

2. When Dr. Wade was consulted by the plaintiff's intestate, the next morning after the occurrence in question, no action had then been instituted by him against the company for the injury of which he complained, though he probably entertained some intention of bringing suit. Dr. Wade had been treating him for gastritis, and he had shown decided improvement. It does not appear what statement Stone made to the doctor, nor that he sought any opinion of him in respect to any contemplated action against the defendant; nor is it made to appear but that his statements were made solely with a view of obtaining medical treatment. Dr. Wade testified in respect to the objective symptoms,—those he was able to discover by

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observation and examination,— and although he says, in substance, that he could not distinguish between these symptoms and the subjective ones, learned by communication from the patient, in arriving at his conclusions, we think his evidence was competent and was properly admitted and that the court properly refused to strike it out. The statements or declarations of a patient, made to a physician or surgeon for the purpose of obtaining advice or treatment, descriptive of his pains and their location, his symptoms, and the manner in which he is affected by an injury, may be given in evidence to show the character and extent of his injury (*McKeigue v. Janesville*, 68 Wis. 57; *Quaife v. C. & N. W. R. Co.* 48 Wis. 513); but not when made to an expert, after action brought for an injury, in order to enable him to testify as a witness at the trial for the injured party (*Stewart v. Everts*, 76 Wis. 40, 42; *Abbot v. Heath*, 84 Wis. 317, 320). The rulings of the circuit court in respect to the evidence of Dr. Wade are fully sustained by the cases above cited.

3. The error, if any, in charging the jury that the plaintiff might recover punitory damages, was cured and obviated by the form of the verdict, by which the compensatory damages were stated at $1,000, and the punitory damages at $500; the verdict as to the punitory damages having been set aside on motion for a new trial. We do not think that there is any ground for saying that the charge of the court allowing the jury to find punitory damages had any tendency to increase the amount of the compensatory damages. As there were separate findings on the subject of damages, the presumption is that the compensatory damages were confined within proper limits.

This view of the case renders the consideration of all other errors assigned unnecessary. For these reasons, the judgment of the circuit court must be affirmed.

By the Court.— The judgment of the circuit court is affirmed.

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LAMONT and others, Respondents, vs. WOOTTON, Assignee. Appellant.

May 5 — May 25, 1894.

Voluntary assignment by partners: Waiver of right to exemptions.

Partners assigned for the benefit of creditors all their property except such as might by law be exempt from seizure on execution or attachment. All the property was delivered to the assignee, and was included in the inventory without mention of exemptions, and no claims of exemptions were made until nearly a month later, after the assignee had expended labor and money upon the property in caring for and insuring it and getting it ready to be sold. *Held*, a waiver of the right to exemptions from the partnership property.

APPEAL from the Circuit Court for *Dane* County.

This is an appeal by an assignee for the benefit of creditors from an order of the circuit court directing the assignee to permit the assignors severally to select, from the copartnership property, tools, implements, stock in trade, to the amount and value not exceeding $200, as and for their exemptions, under subd. 8, sec. 2982, R. S. The assignors were copartners. They made an assignment for the benefit of their creditors on December 29, 1892, both as a copartnership and as individuals. The assignment contained an exception, from the property assigned, of such as might be exempt by law from seizure on execution or attachment. The property was all delivered to the assignee. No schedule of property claimed to be excepted was made at the time. On January 18, 1893, an inventory of the property assigned, and a list of their creditors, were filed. In the inventory no mention is made of property excepted from the operation of the assignment, or of exemptions. Afterwards, on January 24, 1893, the assignors severally made demand upon the assignee for certain of the copartnership property, designated as and for their exemptions.

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Their demands included cash, accounts due to the partnership, and some stock in trade. The assignee refused their demand. Then, on January 31, 1893, on their application, the circuit court made an order directing the assignee to permit the assignors each to select, as his exempt property, not to exceed the value of $200, from the assigned property, of the implements, tools, and stock in trade, and not limited to their former selections. From that order the assignee appeals.

For the appellant there was a brief by *Smith & Buell*, and oral argument by *C. E. Buell.*

For the respondents there was a brief by *La Follette, Harper, Roe & Zimmerman*, and oral argument by *G. E. Roe.* They contended, *inter alia*, that where the statute prescribes no particular method to be pursued by the assignor in order to retain his exemptions, it is usually held sufficient, if he reserve them generally in the conveyance, to entitle him to have them set out upon application made within a reasonable time after the assignment is executed. *Peterman's Appeal*, 76 Pa. St. 116; *Hildebrand v. Bowman*, 100 id. 580; *Heckman v. Messenger*, 49 id. 465; *Brooks v. Nichols*, 17 Mich. 38; *Rosenthal v. Scott*, 41 id. 632; *Richardson v. Marqueze*, 59 Miss. 81, 92–95; *Rainwater v. Stevens*, 15 Mo. App. 544; *Bradley v. Bischel*, 81 Iowa, 81; *Nave v. Britton*, 61 Tex. 572; *Blanchard v. Paschal*, 68 Ga. 32; *Frank v. Myers*, 97 Ala. 437; *Clark Shoe Co. v. Edwards*, 57 Ark. 331; *Close v. Sinclair*, 38 Ohio St. 530.

NEWMAN, J. This case is governed by the decision of this court in the case of *Bong v. Parmentier*, 87 Wis. 129. It is not distinguishable in principle from that case. The copartnership, as such, had no right of exemption. The copartners had no such right in the copartnership property until after a severance. The assignment conveys the entire copartnership property, unsevered, to the assignee. No

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claims of exemptions were made for nearly a month after the entire property had been in the possession of the assignee, and he had expended labor and money upon it in caring for it, insuring it, and getting it ready to be sold. This was a waiver of the right to have an exemption from the partnership property.

By the Court.— The order of the circuit court is reversed.

LAMONT and others, Respondents, vs. HIBBARD, SPENCER, BARTLETT & Co., Appellant.

May 5 — May 25, 1894.

Voluntary assignment: Order allowing exemptions: Appeal by creditor.

Under sec. 16, ch. 385, Laws of 1889, a creditor whose name has been put by the assignor on the list of creditors filed may appeal from an order of the court allowing to assignors the exemptions claimed by them.

APPEAL from the Circuit Court for *Dane* County.

For the appellant there was a brief by *Bushnell, Rogers & Hall*, and oral argument by *A. R. Bushnell.*

For the respondents there was a brief by *La Follette, Harper, Roe & Zimmerman*, and oral argument by *G. E. Roe.*

NEWMAN, J. This is an appeal by a creditor of the assignors from the same order from which the appeal in *Lamont v. Wootton, ante*, p. 107, was taken by the assignee. The appeal is by *Hibbard, Spencer, Bartlett & Co.*, a corporation, one of the creditors named in the list of creditors filed by the assignors. The appeal was taken before it was known whether the assignee would appeal. There was a motion to dismiss the appeal on the ground that a mere creditor at large had no right or standing to appeal.

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No doubt a creditor has sufficient interest and standing to sustain an appeal. The statute provides that proceedings in a voluntary assignment shall be under the supervision of the circuit court or of the circuit judge (R. S. sec. 1693), and they are no doubt to be treated as in the nature of special proceedings in the circuit court. The assignor, the assignee, and all the creditors are to be deemed parties to such proceedings. They are all necessary parties to the administration of the estate. Sec. 16, ch. 385, Laws of 1889, which is an amendment and addition to the laws relating to voluntary assignments (sec. 1), provides that "appeals may be taken to the supreme court by any such insolvent debtor, or by any creditor, from any order or judgment made or entered in such proceedings by such judge or court." This must be construed as allowing any creditor to appeal from any order made by the court or judge in proceedings under the statutes relating to voluntary assignments; for ch. 385, Laws of 1889, is to be considered, not only as being an amendment and addition to the statutes relating to voluntary assignments, but as being *in pari materia* with them. It is to be construed together with all other statutes on the subject as if they formed parts of the same statute and were enacted at the same time. *State ex rel. Sweet v. Cunningham*, *ante*, p. 81, and cases cited. Viewed from this position, it is clear that the statute gives the right to appeal to a creditor who has become a party to the proceedings by having his name put by the assignor in the list of creditors filed by him.

The motion to dismiss the appeal is denied. The order of the circuit court must be reversed, for the reasons stated in the decision of the assignee's appeal.

By the Court.— The order of the circuit court is reversed.

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SLAUGHTER, Appellant, vs. BERNARDS, Respondent.

May 5—May 25, 1894.

Evidence: Laws of another state: Power of attorney to convey lands: Acknowledgment: Estoppel: Appeal: Questions not considered by trial court.

1. Where the laws of another state have not been offered in evidence they cannot be considered by the court; and references to them in the argument of counsel do not amount to an offer and admission of them in evidence.
2. A power of attorney offered in connection with other title papers was presumably offered as a title paper and not to show an estoppel.
3. A power of attorney offered as a title paper was ruled out as not properly executed, and thereupon all subsequent instruments in the chain of title were ruled out as offered, and a nonsuit was granted. *Held*, that on appeal this court will not pass upon the legal effect of such subsequent instruments as showing plaintiff's title or an estoppel of defendant to deny such title,—that question not having been considered by the trial court.
4. Under sec. 96, ch. 98, R. S. 1849 (sec. 4159, R. S. 1878), a power of attorney theretofore recorded, relating to lands in this state, and purporting to have been acknowledged before a notary public in another state, and having his certificate in the ordinary form, is *prima facie* good and sufficient, and it or the record thereof is admissible in evidence, in the absence of proof of the laws of such other state.
5. In the absence of proof as to the laws of another state they will be presumed to be the same as our own, under which a notary public may take the acknowledgment of a deed.
6. A power of attorney need not be attested or recorded to be a valid power to convey lands.

APPEAL from the Circuit Court for *Dane* County.

Ejectment. The facts are stated in the opinion.

For the appellant there were briefs by *Bashford, O'Connor, Polleys & Aylward*, and oral argument by *R. M. Bashford* and *I. C. Sloan*.

F. J. Lamb and *C. F. Lamb*, attorneys, and *Burr W. Jones*, of counsel, for the respondent, to the point that a

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power of attorney to convey lands must possess the same requisites and observe the same solemnities as are necessary in a deed directly conveying the lands, cited *Gee v. Bolton*, 17 Wis. 604, 612; *Clark v. Graham*, 6 Wheat. 577, 579; *Lumbard v. Aldrich*, 8 N. H. 31; *Gage v. Gage*, 30 id. 420; *Lord v. Sherman*, 2 Cal. 498; 1 Parsons, Cont. (7th ed.), *110, note c.

ORTON, C. J. This is an action by the plaintiff to recover of the defendant certain lands in the county of Dane, described as follows, viz.: "The northeast quarter and the west half of southeast quarter of section thirty-six (36), township eight (8) north, range eight (8) east, containing two hundred and forty (240) acres, more or less." The plaintiff, in his complaint, sets up the successive conveyances and instruments through which he claims title to the premises. The defendant, in his answer, alleges adverse possession of twenty years and an adverse possession of ten years under deed; alleges certain defects in the plaintiff's chain of title; and sets up, through sheriffs' deeds on the foreclosure of mortgages and successive conveyances, title in himself.

The plaintiff, to prove his title to the premises, introduced in evidence: (1) The record of a deed of the premises from Ramsay McHenry, by his attorneys, John Catlin and A. Noonan, to George H. Slaughter, dated the 12th day of February, 1840. (2) The record of a mortgage on the premises of the same date, from the said George H. Slaughter to the said Ramsay McHenry, to secure the payment of $620, together with the following indorsement on the record thereof, to wit: "This mortgage canceled by agreement;" and refers to pages 303 and 304 of volume 4 of Deeds. (3) The record of an agreement, dated the 12th day of November, 1840, signed by Ramsay McHenry, by his attorney in fact, James McHenry Boyd, and George

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H. Slaughter, by which said deed and mortgage were canceled, and recorded on the pages referred to in said indorsement. (4) The record of a power of attorney dated the 29th day of April, 1843, from Ramsay McHenry, of Hartford county in the state of Maryland, to James McHenry Boyd, of the state aforesaid, empowering him to sell or dispose of certain lands, among which are the above lands, either at public or private sale, and to execute, acknowledge, and deliver deeds of conveyance of the same in the name of the said Ramsay McHenry, and to act in the premises according to his judgment and discretion. This power of attorney was signed and sealed by Ramsay McHenry, and witnessed and acknowledged by the same person, and acknowledged by him as a notary public, in the state of Maryland. (5) In connection with the power of attorney, the plaintiff offered a deed of said premises, dated the 4th day of August, 1843, from Ramsay McHenry, by his attorney, J. McHenry Boyd, of Baltimore, Md., to Gabriel T. Long of Dane county, in trust for the use and benefit of Mrs. Mildred Ann Slaughter, wife of George H. Slaughter.

When the record of the said power of attorney was offered, the counsel of the defendant objected on the grounds that said power was not entitled to registration; that it had only one witness; and that it was not properly acknowledged according to the laws of Maryland. In connection with these objections to the power of attorney, the said counsel objected also to the said record of the cancellation agreement, because the authority of the said Boyd as attorney in fact of the said Ramsay McHenry was not proved, and that it was not entitled to be recorded. The court, after argument, said: "I am persuaded that, under the statute, the plaintiff should show that the power of attorney is a valid instrument. Of course, if you wish to do that you may do so, if you have any proof to offer

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on that question." The plaintiff's counsel said: "We offer the record. I understand the court sustains the objection to the offer." The court said: "As the record now stands, there being no proof as to the law governing the execution of the instrument, by which it was executed in the state of Maryland, the court will have to sustain the objection," — to which ruling the plaintiff duly excepted. The plaintiff then offered the above record of the deed from Ramsay McHenry, by his attorney in fact, the said Boyd, to Gabriel T. Long.

This is the order of proof so far, according to the record, by the bill of exceptions, and the action of the court thereon. According to an amendment of the bill of exceptions, allowed several months after the trial, and perhaps not strictly according to the rules of the court, it seems that the counsel of the defendant, in their arguments to the court on their objections to the power of attorney, read and commented on what they claimed to be the laws of Maryland in respect to the acknowledgment of deeds, without objection. It is not stated that the counsel of the plaintiff heard this reference to the laws of Maryland; but it is stated in the amendment "that the court considered said statutes." If the court did consider the said Maryland statutes, it certainly had no right to do so, for the said statutes had not been proved in any way or offered in evidence, and this is corroborated by what follows in the regular bill of exceptions,—"that *there had been no proof* as to the law of Maryland governing the execution of the instrument," as above stated. It is sufficient that the laws of the state of Maryland had not been proved and offered in evidence, and that it is so stated in the record. It follows, therefore, that the defendant's counsel had no right to read from them and comment thereon in their arguments on the objection to the admissibility in evidence of the power of attorney, and the court had no right to con-

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sider the same. The learned counsel of the respondent contends that this was, in effect, an offer of the laws of Maryland in evidence, and the admission of the same by the court, and that the order of proof was in the discretion of the court. This last proposition is correct, and would have much force if there were any facts to which it could be applied. But the defendant's counsel did not offer in evidence the laws of Maryland, even on or during their argument on the objection. They were never offered in evidence at any time, in order or out of order, and they were not admitted in evidence by the court. The argument of counsel cannot supply the place of evidence or amend the records of the court.

It would seem from the above record of what occurred when the objection to the power of attorney was sustained that the plaintiff's counsel intended to rely solely on the admissibility of the record of the power of attorney under the laws of this state, as they now contend on this appeal that it was admissible under sec. 96, ch. 98, R. S. 1849, and sec. 4159, R. S. 1878. The court seems to have based its decision on the ground that the laws of Maryland "had not been proved" to sustain the power, without considering the effect of the above statute of this state. The plaintiff's counsel were not bound or called upon to state the ground on which they claimed the power of attorney admissible. They had the right to rest upon the objections made by the other side to its admissibility and the decision of the court thereon, and let the defendant's counsel take the responsibility of the rejection of the record of the power of attorney.

The plaintiff, notwithstanding the rejection of the power of attorney, continued to make offers of conveyances as follows: (6) A mortgage from Gabriel T. Long back to Ramsay McHenry, to secure the sum of $1,028.50, the purchase money of the preceding conveyance, dated the 4th day of

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August, 1843. (7) The satisfaction of said mortgage, signed and sealed by Ramsay McHenry, by John Catlin, his attorney, dated July 21, 1847. (8) A mortgage from George H. Slaughter and others to Edward Campbell, to secure the sum of $144.83, dated the 23d day of October, 1847. (9) Mortgage from George H. Slaughter and others to Calvin C. Williams, to secure the sum of $350. These two mortgages were signed, also, by the said Gabriel T. Long and Mildred Ann Slaughter. (10) Mortgage from George H. Slaughter, M. A. Slaughter, and Gabriel T. Long, to Calvin C. Williams, to secure a certain bond, dated the 6th day of September, 1848. (11) Deed from Robert Main, sheriff of Dane county, to Calvin C. Williams, on foreclosure, dated the 19th day of July, 1857. (12) Deed from Andrew N. Bishop, sheriff of Dane County, to Calvin C. Williams, on foreclosure, dated December 6, 1856. (13) Deed from Andrew Bishop, sheriff of Dane county, to Calvin C. Williams, on foreclosure, dated December 13, 1852. (14) Deed from the heirs of Calvin C. Williams to Jacob Lenz, dated April 30, 1868. (15) Deed from Julius T. Clark, guardian of the heirs of Calvin C. Williams, to Jacob Lenz, dated July 27, 1868. (16) Deed from Jacob Lenz and wife to *Henry Bernards*, dated March 15, 1868. (17) Deed from *Henry Bernards* to N. B. Van Slyke, dated January 27, 1875. (18) Deed from N. B. Van Slyke and wife to *Henry Bernards*, the defendant in this action. The defendant's counsel objected to all of these offers, and the court sustained the objection. The plaintiff also offered the marriage settlement between George H. Slaughter and Mildred Ann Long, his future wife, by which she was to have a separate ownership and use of her property as an inheritance from her father during her life, and then to pass to her heirs. This also was ruled out.

After the court had rejected the record of the power of attorney, it was therefore compelled to sustain objections

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to all the subsequent deeds, mortgages, and agreements within the chain of the plaintiff's title, and which appeared to be also within the chain of the defendant's title. The plaintiff offering no further testimony, the court granted a nonsuit of the case, and from that judgment the plaintiff has appealed.

The court no doubt considered the power of attorney the necessary link in the chain of the plaintiff's title, and that its rejection put an end to the case. The learned counsel of the appellant is in error in supposing that this court can pass upon the legal effect of the conveyances and other evidence offered after the rejection of the power of attorney, which were merely offered and rejected, and not considered by the court as evidence, and not ruled or passed upon as such. The learned counsel have presented a very able and elaborate brief of the principles and authorities applicable to such evidence, and claim (1) that, in view of such evidence, the plaintiff's title to the premises is perfect, and that he is entitled to recover in the action; and (2) that such evidence shows that the defendant's title is traced to the same source as the plaintiff's title, and that therefore the defendant cannot question plaintiff's title. It is certain the court did not consider such evidence on the question of title, and it is equally certain that the court did not consider it on the question of estoppel. If the learned counsel had offered such evidence with the declared object of raising the question of estoppel, and for such special purpose, then the court would doubtless have considered and passed upon that question. It was not so offered, and therefore not considered. In *Bogert v. Phelps*, 14 Wis. 88, DIXON, C. J., said: "The first position taken by counsel for the appellant is that in order to enable the respondent to impeach the appellant's title, which was derived from the attachment debtor, he must show that he represented a prior creditor of the latter. As has been already observed, this

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is no doubt a correct legal proposition, but it is not involved here. No question of the kind was made on the trial below. No objection was raised, no exception taken, nor instruction asked which in any manner involved it. . . . We can review no questions which were not fairly presented for the consideration of the court before which the action was originally tried." I have quoted somewhat at length from the opinion, to show the appositeness of the authority. I am not aware of this rule having been changed by this court. This is the rule in other courts of last resort. In *McDonald v. Smalley*, 1 Pet. 620, the whole testimony had been taken on both sides, and preserved in the record. The case was dismissed on a question of jurisdiction, and the testimony had not been considered by the court below. The supreme court was asked by both parties to hear the whole case, but declined to do so, for the reason that no other question had been decided by the court below than that of jurisdiction. The respondent's counsel cite also *Brockett v. Brockett*, 3 How. 691; *Delaney v. Brett*, 51 N. Y. 78, 83; *Salisbury v. Howe*, 87 N. Y. 128–134. The only question decided by the court below was of the sufficiency of the recorded power of attorney as authority to James McHenry Boyd to execute deeds in the name of Ramsay McHenry. The court having decided to sustain the objection of the defendant to the power of attorney, the trial was virtually at an end. The subsequent evidence was offered by the plaintiff's counsel apparently for the mere purpose of having it rejected and saving exceptions to the ruling. The subsequent evidence was offered in connection with the power of attorney, and dependent upon it, and was rejected with it. No other object or purpose of such evidence was stated to the court. The only apparent ground for the nonsuit was the insufficiency of the power of attorney as a link in the plaintiff's chain of title, and that is the only question before the court. The case was not tried in

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the court below on its merits, but nonsuited, and defendant's evidence is not yet in the case.

Having at length cleared the way for the only real question in the case, we will proceed to consider it. The question comes before the court as it was presented to the circuit court. The record of the power of attorney was offered in evidence by the plaintiff's counsel. It was objected to by the defendant's counsel. After argument, the court ruled on the question in this way: "As the record now stands, there being no proof as to the law governing the execution of the instrument, by which it was executed in the state of Maryland, the court will have to sustain the objection." *By the Court:* "The nonsuit is granted." The objections of the defendant's counsel to the offer were (1) that it was not the best evidence; (2) that it does not appear that the person taking the acknowledgment was a competent officer; (3) that it was executed in the state of Maryland before a notary public, and there is no proof of the authority of the notary public to take this acknowledgment; and (4) that it is not executed under the laws of Maryland or Wisconsin. The court seemed to be under the same impression indicated in the objections,—that it was incumbent upon the plaintiff to show that the power of attorney was executed according to the laws of Maryland. Herein consisted the error of the court.

1. In the absence of proof of the laws of Maryland, under the laws of this state both the power of attorney and the record thereof are *prima facie* good and sufficient, and entitled to be introduced in evidence. Sec. 96, ch. 98, R. S. 1849, provides as follows: "All deeds, mortgages, or other instruments in writing relating to real estate situate within this state which shall have been recorded in the office of any register of deeds before this section shall take effect, purporting to have been acknowledged or proved without this state, and having upon them substantially the ordinary

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form of a certificate of acknowledgment or proof, purporting to have been signed by some officer in another state or country, shall be deemed *prima facie* in all legal proceedings to have been acknowledged or proved (as the case may be) before the proper officer and in conformity with the laws of such state or country where it purports to have been acknowledged or proved, and the records of all such deeds, mortgages, and instruments, certificate of acknowledgment or proof may be read in evidence in like manner and with the same effect as the originals." This is the present statute (sec. 4159, R. S.), with some immaterial changes of words, and using the word "presumptively" instead of "*prima facie*." This statute requires neither construction nor comment to make it apply to the instrument in question. It is remedial and curative, whenever there is any question about the acknowledgment or registration of the instrument, and makes both the record and acknowledgment *prima facie* or presumptive evidence in all legal proceedings that the instrument was acknowledged according to the laws of such state or country, and was duly recorded, so that the record may be read in evidence the same as the original. In *Fallass v. Pierce*, 30 Wis. 443, Chief Justice DIXON applied this statute "to make the acknowledgment *prima facie* valid for the purpose of the record, and consequently the record *prima facie* good for all purposes which can be served by any record."

2. It is correctly said in the brief of the respondent that "a power of attorney to convey lands must have the same requisites as a deed." *Gee v. Bolton*, 17 Wis. 604–612; 1 Pars. Cont. (7th ed.), 110, and note c, and other cases cited in the brief.

3. It is not essential to a power of attorney that it should be either attested or recorded to be a valid power to convey lands, any more than the deed itself to be a valid conveyance. This has been repeatedly held by this court in

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respect to deeds. *Myrick v. McMillan*, 13 Wis. 188; *Quinney v. Denney*, 18 Wis. 485; *McMahon v. McGraw*, 26 Wis. 614; *Gilbert v. Jess*, 31 Wis. 110; *Knight v. Leary*, 54 Wis. 459; *Hewitt v. Week*, 59 Wis. 449; *McPherson v. Featherstone*, 37 Wis. 632; *Leinenkugel v. Kehl*, 73 Wis. 238. In *Hewitt v. Week*, *supra*, Mr. Justice TAYLOR reviewed the authorities, and repeated the principle, in view of the statute requiring a deed to be witnessed and acknowledged, holding that such formalities are only required as notice to a subsequent purchaser. The deed takes effect to pass the title upon its execution and delivery, and not when it is attested or acknowledged. This is, of course, between the parties to the deed. It is good as a conveyance at common law. The power of attorney, by this principle and by the above statute, was not only a valid power and authority to James McHenry Boyd to convey the lands in the name of Ramsay McHenry, but the record, attestation, and acknowledgment were *prima facie* sufficient, and the instrument should have been received in evidence.

4. In the absence of the foreign law, the law of such state will be presumed to be like our own, and by our law an acknowledgment by a notary public is sufficient.

5. It is contended by the appellant's counsel that the power of attorney is sufficient and should have been received because it was recognized and approved as a valid power by George H. Slaughter and Mildred Ann Slaughter in and by the said cancellation agreement, and by their having treated with the said attorney in respect to the title. When this cancellation agreement was offered, it was not offered for such purpose, and the court did not consider it in view of its having such effect. But we have already disposed of this question in respect to the subsequent conveyances, as showing that the defendant traces his title to the same source as the plaintiff and therefore cannot question the plaintiff's title. When the offer was

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not made for this specific purpose, the presumption is that the instrument was offered as a title paper, and that it was rejected as such.

We have disposed of the only question that is properly before us, in holding that the power of attorney ought to have been received in evidence, and that it was error to reject it. It follows that the court ought not to have taken the case from the jury and granted the nonsuit. All the other questions so ably treated in the appellant's brief are as yet premature.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

PINNEY, J., took no part.

FORD, Executor, Appellant, vs. FORD and another, Respondents.

FORD, Executor, Respondent, vs. FORD, imp., Appellant.

FORD, Executor, Respondent, vs. FORD, by guardian *ad litem*, imp., Appellant.

May 7 — May 25, 1894.

ESTATES OF DECEDENTS: WILLS. (1-3) *Extra allowance to executor: Itemizing claim: Amount: Evidence.* (4) *Election by widow not to take under will: Share of "net personal estate."* (5) *Disposition of property devised to her:* Res adjudicata. (6) *Limitation of time for settlement: Removal of executor.* (7) *Attorneys' fees.*

1. Property of a testator was found in four states and was looked after with diligence by the executor, who also investigated a claim that there was property in another state to which the will made no reference. The will was complicated in its provisions and difficult in execution, and suits for its construction were persistently fought in three states. Nearly all the steps taken by the executor were criticised and questioned, and the estate was in constant litigation

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during the entire term of his service. *Held*, that the case was one of "unusual difficulty," and extra compensation was properly allowed the executor under sec. 3929, R. S.

2. Though neither the statute nor the rule (County Court Rules of 1879, XVII, sec. 6) requires it, it is better practice to itemize the executor's claim for extra compensation; but a claim allowed by the county court should not be rejected on appeal merely because it was not itemized, where there was no motion that it be itemized or a bill of particulars furnished, and it was in fact itemized on the trial.

3. Under sec. 3929, R. S., providing for allowance, as extra compensation in certain cases, of such sums "as the county court shall judge reasonable," that court may, in its discretion, allow a sum smaller than that fixed by the uncontradicted evidence as to the value of the services.

4. The "net personal estate" of a testator, not less than one third of which is, under sec. 2172, R. S., to go to the widow if she elects not to take under the will, is the personal estate left after payment of the debts, allowances, and charges and all expenses of administration, including those made necessary by the will.

5. The disposition to be made of property given by a will to the testator's widow, who elected to take the provision made for her by law, having been involved and expressly determined in a prior proceeding, and the entire judgment therein having been affirmed on appeal, that matter is *res adjudicata*, although that part of the judgment was not questioned on said appeal.

6. Where it had been impossible for the executor, though using all reasonable diligence, to complete the administration within the six years allowed by sec. 3850, R. S., it was proper to refuse to remove him and appoint an administrator *de bonis non*.

7. An infant, who had no property except his prospective interest in the estate, being a necessary party to litigation involving the estate, no part of which was commenced by him or on his behalf, the expenses incurred by his guardian *ad litem* for attorneys' fees and disbursements in such litigation were rightly allowed as part of the expenses of administration; but the expenses incurred by the testator's widow in such litigation, much of which she herself commenced, were properly disallowed.

APPEALS from the Circuit Court for *Dane* County.

These are three separate appeals from a judgment of the circuit court for Dane county, rendered in the course of the settlement of the estate of Francis F. Ford, deceased.

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Francis F. Ford died testate, January 26, 1886, leaving property in five states,— Wisconsin, Michigan, Iowa, Kansas, and Missouri. His will was duly admitted to probate in the county court of Dane county, June 17, 1886, and letters testamentary issued to *J. C. Ford.* The legatees therein named are his widow, *Margaret G. Ford*, his only son, *Marcus C. Ford*, and his three brothers, Edward I., *Joseph C.*, and Henry T. Ford. The will is complicated in its provisions, difficult of construction, and difficult in execution. It was before this court in an action for construction thereof, which will be found reported in 70 Wis. 19, where the will is printed at length. Another appeal, taken in course of the settlement of the estate, will be found reported in 80 Wis. 565. The widow duly renounced under the will, and elected to take the provisions made for her by law. Litigation followed, commencing with a contest of the will by the widow, and litigation has also been carried on in four different states. Ancillary administration has also been taken out in the states of Michigan and Missouri, and that in Missouri was not terminated till after the expiration of six years after the issuance of the letters testamentary by the county court of Dane county.

On the 18th day of August, 1892, the widow filed a petition in said county court, asking, among other things, for the removal of the executor and appointment of an administrator *de bonis non*, on the ground that six years had elapsed since the granting of letters testamentary, and on the further ground that the executor had failed to properly discharge his duties under the will. The executor answered this petition, claiming that earlier settlement of the estate was impossible, and that he had faithfully discharged his duties. Upon the trial of this issue in the county court the petition for removal was dismissed, and judgment entered accordingly. From this judgment *Margaret G. Ford* and *Marcus C. Ford* appealed to the circuit court for Dane county.

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October 1, 1892, the executor filed in the Dane county court his final account and report, and his petition for its allowance. The widow and son thereafter filed a statement in the form of a complaint, making fifteen specific objections to the account, to which complaint and objections the executor made answer. December 12, 1892, the executor filed a supplemental account, bringing his final account down to that date. The county court tried the issues arising upon the account and the objections, and filed its judgment thereon, February 14, 1893. The widow and son appealed from the whole of such judgment, and the executor appealed from the disallowance of certain items of the account. When the appeal came to the circuit court, the executor filed supplemental accounts, bringing down his final account to August 8, 1893.

The appeal in the matter of the application for removal of the executor, and the various appeals from the judgment rendered upon the final account, were by stipulation all heard together in the circuit court, and the two proceedings were consolidated, and, after trial, findings and judgment were entered in the circuit court, October 30, 1893, as of August 28, 1893. From this judgment separate appeals were taken by the executor, by the widow, and by *Marcus C. Ford*, which were all argued together in this court.

The executor, in his appeal, claims that the court erred — first, in disallowing $3,000 of the $6,000 claimed by him for extraordinary services; second, in disallowing two items of $200 and $97.50, respectively, paid by the executor to attorneys for legal services; third, in disallowing three items of $57.50, $20.50, and $28.55, respectively, being certain expenses of the executor to Kansas City and return, and an hotel bill at Madison; fourth, in directing the executor to pay to the counsel for the guardian *ad litem* of *Marcus C. Ford* the sum of $1,393.77; fifth, in adjudging

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that one half of the net rentals of the estate be assigned to *Marcus C. Ford.*

The widow, in her appeal, claims that the court erred — first, in allowing any extra compensation to the executor over and above the statutory *per diem* and percentages; second, in not removing the executor, and in holding that he had performed his duties with diligence; third, in first deducting all the expenses of administration from the amount of the personal estate, and assigning to the widow only one third of the balance; fourth, in not allowing to her the expenses of litigation paid by her in other states as charges against the estate.

The appeal of *Marcus* makes the same points.

Geo. W. Bird, for the executor, argued, among other things, that the failure to itemize the claim for extra compensation was not fatal. It was fully itemized in the testimony. *Wisner v. Mabley Estate*, 70 Mich. 271; *Cameron v. Cameron*, 15 Wis. 1; *Reese v. Gresham*, 29 Ala. 91; *Waller v. Ray*, 48 id. 468; *Raines v. Raines' Ex'rs*, 51 id. 237; *Estate of Gilpin*, 138 Pa. St. 143. The fees of the counsel of the guardian *ad litem* were not proper charges against the estate, under sec. 4041, R. S. 1 Woerner, Admin. sec. 152; 2 id. secs. 356, 515; *Wait v. Holt*, 58 N. H. 467; *In re Page*, 57 Cal. 238, 242; *Austin v. Munro*, 47 N. Y. 360, 366. Sec. 3850, R. S., limiting the time for final settlement of estates to six years, does not apply to a case where the executor is required to hold the estate during the continuance of two lives in being at the death of the testator, or where the provisions of the will otherwise render it impossible to make final settlement within that time. *Scott v. West*, 63 Wis. 529; S. & B. Ann. Stats. sec. 3850, note; *Ford v. Ford*, 70 Wis. 19. An executor or trustee will not be removed unless there is the most imminent danger of a breach of the trust, even if some or all of the beneficiaries are dissatisfied with the management. 1 Perry, Trusts, sec. 276; *Berry*

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v. Williamson, 11 B. Mon. 273; *Massey v. Stout*, 4 Del. Ch. 274; *Lathrop v. Smalley's Ex'rs*, 23 N. J. Law, 192. The statutory power of removing an executor, vested in the sound discretion of the county court, will not be interfered with unless there has been a very manifest abuse of discretion. *Cutler v. Howard*, 9 Wis. 309; *Estate of Pike*, 45 id. 391. The expenses of probating the will and of the construction and partition suits are very clearly a part of the expenses of administration. *Sawyer v. Baldwin*, 20 Pick. 378; *Bowditch v. Soltyk*, 99 Mass. 136; *Howard v. Smith*, 78 Iowa, 73; *Heiss v. Murphey*, 43 Wis. 45; *Will of Smith*, 52 id. 543; *Scott v. West*, id. 37; *Webster v. Morris*, 66 id. 367, 400; *Silverthorn's Will*, 68 id. 372, 380; *Ford v. Ford*, 70 id. 19, 68; *Will of Fuller*, 75 id. 431, 438; *Scott v. Neeves*, 77 id. 305, 313; *Burnham v. Burnham*, 79 id. 557, 566; 1 Redf. Wills (4th ed.), 494.

B. J. Stevens, attorney for *Margaret G. Ford* and of counsel for *Marcus C. Ford*, and *A. L. Sanborn*, guardian *ad litem* and attorney for *Marcus C. Ford*, contended, *inter alia*, that under the statute (ch. 106, Laws of 1877; R. S. secs. 2170–2172) extending dower to personal property, it has in all respects the characteristics of dower. The title originates in the contract of marriage and is taken not through the husband, but in the widow's own right by appointment of law, and is not subject to the payment of debts, or is subject to the payment of such indebtedness only as by statute is specially made chargeable thereon. *Hardy v. Scales*, 54 Wis. 452; *Van Steenwyck v. Washburn*, 59 id. 483; *Leach v. Leach*, 65 id. 284; *Beem v. Kimberly*, 72 id. 343; *Earl of Darlington v. Pulteney*, 3 Ves. Jr. 384; *Grissell v. Swinhoe*, L. R. 7 Eq. 291; *Cooper v. Cooper*, L. R. 7 App. Cas. 53, 59, 69, 79; L. R. 6 Ch. App. 19, 21; *Scott v. West*, 63 Wis. 529, 555; *In re Wilber*, 52 id. 295; *Wilber v. Wilber*, id. 298; *Farnsworth v. Cole*, 42 id. 403, 405; *Mock v. Watson*, 41 Iowa, 241; *Smith v. Zuckmeyer*, 53 id. 14, 17; *Phil-*

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lips v. Carpenter, 79 id. 600, 601; *Burns v. Keas*, 21 id. 257. The widow's dower in real and personal property vests in her immediately upon the death of her husband. *Foster v. Fifield*, 20 Pick. 67; *Nickerson v. Bowley*, 8 Met. 427; *Adams v. Adams*, 10 id. 171; *Blower v. Morret*, 2 Ves. Sr. 421; *Burridge v. Bradyl*, 1 P. Williams, 127; *Stahlschmidt v. Lett*, 1 Sm. & G. 415; Lush, Husband & W. 91. The corpus of the estate consists only of the balance after deducting the widow's share of the real and personal property. *Grattan v. Grattan*, 18 Ill. 167, 170; *Shields v. Keys*, 24 Iowa, 299; *Ward v. Wolf*, 56 id. 465; *In re Bard's Estate*, 58 Pa. St. 393; *Kennedy v. Shaw*, 43 Mich. 359; Herrick & Doxsee, Dower, 386, notes, 1, 2. The widow, therefore, should have been assigned her dower interest in the personal property before deducting the expenses incident to the execution of the will. *Leach v. Leach*, 65 Wis. 284, 290; *Ford v. Ford*, 70 id. 68; *Scott v. Neeves*, 77 id. 305, 313; *Scott v. West*, 63 id. 588; *Webster v. Morris*, 66 id. 400; *Miller's Ex'rs v. Simpson*, 2 S. W. Rep. 171; *Mallory's Adm'rs v. Mallory's Adm'r*, 92 Ky. 316; *Plympton v. Plympton*, 6 Allen, 178; *Firth v. Denny*, 2 id. 468; *Sill v. Sill*, 39 Kan. 189. A provision for a widow in lieu of dower entitles her, if she takes under the will, to take as purchaser for a valuable consideration, not subject to that abatement to which general legacies are subject. 2 Woerner, Admin. sec. 452; *Security Co. v. Bryant*, 52 Conn. 311; *Pollard v. Pollard*, 1 Allen, 490; *Lord v. Lord*, 23 Conn. 327, 330; *Hubbard v. Hubbard*, 6 Met. 50; *Richardson v. Hall*, 124 Mass. 228; Lush, Husband & Wife, 91 (t); *Williamson v. Williamson*, 6 Paige, 298; *In re Gotzin*, 34 Minn. 159, 167. And such a provision is superior to specific as well as general legacies. Woerner, Admin. sec. 452. The services for which extra compensation was made to the executor should have been stated specifically by items. *Wisner v. Mabley Estate*, 70 Mich. 271, 285; *S. C.* 74 id. 143; *Steel v. Holla-*

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day, 20 Oreg. 463; *Wright's Adm'rs v. Wilkerson*, 41 Ala. 267; *Pearson v. Darrington*, 32 id. 273; *Wright v. Wright*, 64 id. 88; *Price's Estate*, 81 Pa. St. 263; *Blake v. Pegram*, 109 Mass. 541; Cheever, Probate Law, 206; *Swan v. Wheeler*, 4 Day, 137; 2 Daniel, Ch. Pl. & Pr. 1231; *Fairman's Appeal*, 30 Conn. 205; 2 Woerner, Admin. 1149, note 5, 1169, note 3; *May v. Green*, 75 Ala. 162, 167; Gary, Probate Law (2d ed.), sec. 599; County Court Rule XV, subd. 2; *Wellborn v. Rogers*, 24 Ga. 558, *Harris v. Ely*, 25 N. Y. 138; *Hutchinson's Appeal*, 34 Conn. 300; *In re Jones*, 1 Redf. 263.

WINSLOW, J. 1. As to the extra compensation allowed to the executor. The statute provides (R. S. sec. 3929) that, in addition to his *per diem* and commissions, an executor shall be allowed as compensation such further sums, "in cases of *unusual difficulty* or extraordinary services, as the county court shall judge reasonable." It seems entirely clear to us that this has been a case of *unusual difficulty*. We entirely agree with the remarks of the county judge on this subject as follows: "If there ever was a case for extra compensation under our statute, this is one. No reported case that I have seen or been referred to compares with it. In this case there has been property found in four states, and looked after with diligence by the executor. It is claimed that there was and is also property in another state. This required and received investigation at the hands of the executor. He did not see fit to litigate for it. No party in interest, so far as it appears, offered to secure the estate against costs if he would do so. The rights of those entitled to that property have not been waived or lost by the action or nonaction of the executor, so far as appears. The will of the deceased made no reference to such property. The estate has been in constant litigation that has been persistent and spirited during the entire term

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of the executor's service. But few, if any, steps have been taken by the executor that have not been criticised and questioned. The suits for the construction of the will have been persistently followed and fought in three states through the courts to the courts of last resort in each, with substantially the same result in all. I therefore find it a case for extra compensation. It is said that the charge for extra compensation was not itemized, and therefore should not be allowed. That the charge was not itemized is an objection to the claim, but full proof has been taken on the subject, and the charge itemized on the trial. I do not think the objection that the charge was not itemized a fatal one."

As to the point that the claim for extra compensation should have been itemized, doubtless such would be the better practice, although no statute seems to require it, and the rule on the subject only requires that it be "set up as a claim in the statement of account." County Court Rules of 1879, XVII, sec. 6. It seems clear that the proper course of the objecting party would have been to move that the claim be itemized or made more definite and certain, or that a bill of particulars be furnished. Probably, had such a motion been made, it would have been granted. In the absence of such a motion, we would not be justified in rejecting the entire claim now, especially when it appears that it was itemized on the trial.

It is claimed by the executor that the court erred in not allowing $6,000 as extra compensation, because the evidence of all the witnesses examined on the question of the value of the services fixes such value at that sum or more, and therefore the court acted without evidence in placing the value at $3,000. We cannot adopt this view. We do not regard this question as standing on the same footing as an action at law for the recovery of the value of services rendered by one person to another. In the present case the

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court is fixing the value of the labor of its own officer in the transaction of the business of the court. The county judge has necessarily more intimate knowledge of the amount, kind, and worth of the labor performed than any one else. While the evidence of experts is helpful and proper to be considered, we do not consider it absolutely binding on the court. The statute expressly says that such extra compensation shall be allowed as the "county court shall judge *reasonable*." This evidently contemplates that the court shall exercise its sound discretion in the matter, and is not bound to allow exorbitant sums, though there may be evidence uncontradicted which supports such exorbitant charges. The final test is, What does the court, in view of the evidence and its own knowledge of the facts, "judge reasonable?" We think the conclusion reached by the county and circuit courts on the question was right.

2. The widow claims that, upon the filing of her election, she became entitled to one third of the personal property, after first paying debts, funeral expenses, allowances, and such expenses of administration as would have been incurred had F. F. Ford died intestate, and no more; and that the court erred in deducting from the personalty the expenses of the probate of the will and the actions for construction thereof and the actions for procuring partition of real estate, before setting apart her one third. The last-named expenses constitute the greater part of the expenses deducted. The claim, in brief, is that the widow is entitled to one third of the personalty after deducting only the expenses of administering an intestate estate, and not the expenses made necessary in probating and carrying out the provisions of the will. This contention cannot prevail. Upon filing her election to take the provisions made for her by law, instead of the provisions made by the will, the widow becomes entitled "to the same share of his personal estate as if he had died intestate," provided that such

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share shall not exceed one third of his *net* personal estate. S. & B. Ann. Stats. sec. 2172. Had F. F. Ford died intestate, she would have been entitled to the same share as a child in the residue of the estate after payment of allowances, debts, expenses of administration, and funeral charges. R. S. sec. 3935, subd. 6. In this case this share would have been one half of such residue, because there was but one child. Were there no proviso in sec. 2172 limiting *Mrs. Ford's* share to one third of the "*net* personal estate," there would certainly be ground for argument that only the debts, allowances, and necessary expenses of administering an intestate estate should be deducted from the personalty before the widow's share should be set apart to her; and that the additional expenses made necessary in order to carry out the provisions of the will should be a charge on the remainder of the personalty after the widow's share had been set apart. The addition of the proviso, however, limiting the widow's share to one third of the *net* personal estate, plainly limits and controls the preceding provision, and makes it necessary to determine only what is meant by "his *net* personal estate." What was the *net* personal estate left by Francis F. Ford? Clearly it was so much personal estate as was left after payment of debts, allowances, and charges, and all the expenses of administration, as well those expenses which were made necessary by the will as those which would have been incident to the administering of the estate had he died intestate. We see no indication in the statute that the legislature intended the net personal estate should be one sum as to the widow and an entirely different sum as to the children. This would make two different "net personal estates" in the same estate. Had the legislature so intended, it would have been very easy to make the intention clear.

The view we have taken renders it unnecessary to consider a question much discussed on the argument, namely,

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whether the widow takes her share of the personal estate as heir or by way of dower or in lieu of dower. There is nothing in the cases of *Leach v. Leach*, 65 Wis. 284, or *Beem v. Kimberly*, 72 Wis. 343, which conflicts with the views above expressed. In neither of these cases was the question as to what sum constituted the "*net* personal estate" raised or considered.

3. By the will the net annual income of the estate is bequeathed one quarter to the widow during life, one quarter to *Marcus*, one quarter to Edward Irving Ford, one eighth each to *Joseph C.* and Henry T. Ford. By the election of the widow to take under the statute, her one-quarter reverted to the estate. The court below adjudged in effect that the widow's one-fourth went to *Marcus*, as the owner of the next eventual estate, and that he was therefore entitled to one half of the net rentals of the estate. The executor claims that the widow's one-quarter should be accumulated into the residuum of the estate. This question is not open for discussion. This question was involved and expressly decided by the circuit court in the matter of the allowance to the family, brought to this court by appeal, and reported in *Ford v. Ford*, 80 Wis. 565. The findings and judgment of the circuit court in that case, as appears from the printed case, were to the effect that *Marcus C. Ford* is entitled, under the terms of the will, to one half of the net income of the estate which is still under the operation of the will. This does not appear in the report of the case, because it was not excepted to nor appealed from by either party, but the entire judgment was affirmed by this court November 17, 1891. It is consequently *res adjudicata.*

4. In the executor's second and third assignments of error he complains of the disallowance of a number of items of attorney's fees and incidental expenses. Some of these were disallowed because incurred in the course of

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a personal action brought by the widow against the executor, and some because not necessarily incurred. After examination of the record, we think the items were properly disallowed.

5. The circuit and county courts both found that the executor had used all reasonable care and diligence in administering the estate, and that it had been impossible to complete the administration thereof within the six years allowed by the statute (R. S. sec. 3850), and therefore refused to remove the executor and appoint an administrator *de bonis non*. It was said in *Scott v. West*, 63 Wis. 529, that an estate is to be administered according to the will, even though a final settlement within six years is thereby rendered impossible. This principle seems decisive of this case, and we hold that under the facts shown the refusal to remove the executor was right.

6. In his fourth assignment of error the executor complains because the circuit court inserted in the account, and allowed as a part of the expenses of administration, a bill of attorney's fees and disbursements incurred by the guardian *ad litem* of *Marcus* in the course of the litigation in this state, and in an action brought for construction of the will in Michigan. None of this litigation was commenced by or on behalf of the minor, but he was a necessary party thereto, and his guardian *ad litem* would have failed in his duty had he not employed counsel to defend and enforce the rights of the minor. He was a ward of the court. He had no property except his prospective interest in the estate, and we think the expenses so incurred stood on the same ground as the compensation of the guardian *ad litem*, and were rightly allowed, not as costs, but as a part of the expenses of settlement of the estate. The expenses incurred by the widow in this litigation, much of which she herself commenced, do not stand on the same footing, and were properly disallowed.

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As to all objections on the part of either appellant which have not herein been specifically considered, we think the conclusions of the trial court were right. The taxable costs of each party in this court may be taxed and paid out of the estate.

By the Court.— Judgment affirmed on all of the appeals.

PINNEY, J., took no part.

THE STATE EX REL. HAMILTON, Respondent, vs. KREZ, Appellant.

May 7 — May 25, 1894.

Municipal corporations: Officers: City attorney of Milwaukee: Election: Extension of term by legislature: Constitutional law.

1. The territorial charter of the city of Milwaukee having provided for a city attorney to be appointed by the common council, that office existed prior to the state constitution, and is governed by sec. 9, art. XIII, thereof, which provides that all city officers whose election or appointment is not provided for in the constitution shall be elected by the electors or appointed by such authorities as the legislature shall designate.
2. In an act (ch. 35, Laws of 1889) changing the term of office of the city attorney of Milwaukee from two to four years, a provision that the term of office of the then incumbent be extended two years is, in effect, an appointment to the office, and is invalid under sec. 9, art. XIII, Const.
3. Such act operates to extend the term of the city attorney elected at the regular election next ensuing its enactment.
4. No repeal or change of the former law fixing the time for the next regular election for city attorney could be implied from the void provision of the act.

APPEAL from the Circuit Court for *Milwaukee* County.

This is an action of *quo warranto*, commenced in the circuit court, to try the right of the relator to the office of city attorney of the city of Milwaukee.

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Until the 2d day of March, 1889, the term of the office of city attorney of the city of Milwaukee was fixed by law at two years. The then current term would expire on the third Tuesday of April, 1890. On March 2, 1889, ch. 35, Laws of 1889, was published. By the fourth section of that act it is enacted: "The term of office of the city attorney of the city of Milwaukee shall be four years, and the term of the present incumbent of that office is hereby extended to the third Tuesday in April, 1892." Nevertheless, a successor to the then incumbent of that office was elected at the next municipal election on the first Tuesday of April, 1890, who qualified and exercised the office without question. At the time of the municipal election in 1892, the office of city attorney was vacant, and the appellant was elected to fill the vacancy. At the municipal election on the first Tuesday of April, 1894, the relator was elected to the office of city attorney, and qualified. The appellant refused to surrender the office to him.

The appellant's claim is that ch. 35, Laws of 1889, was valid to extend the term then current, so that that term did not expire until the third Tuesday of April, 1892, when a new term of four years began; that while in form he was elected to fill a vacancy, he was really elected to a full term of four years, which will not expire until the third Tuesday in April, 1896, so that there could be no valid election to fill that office at the municipal election held in April, 1894. On these grounds he claims that the relator's claim to the office fails.

On the part of the relator it is claimed that ch. 35, Laws of 1889, so far as it attempted to extend the term of office of the then incumbent, is unconstitutional and inoperative.

There was judgment for the relator, from which the appeal is taken.

Conrad Krez, appellant in person, contended, *inter alia*, that the extension of the term of an incumbent elected or

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appointed to hold over until his successor is elected and qualified is not an appointment but the postponement of an election, and is constitutional. *People ex rel. Loew v. Batcheldor*, 22 N. Y. 134; *People ex rel. Fowler v. Bull*, 46 id. 66; *Christy v. Board of Supervisors*, 39 Cal. 3; *Jordan v. Bailey*, 37 Minn. 175. The office of city attorney of Milwaukee was created after the adoption of the constitution, and is therefore not within its provisions, but is within the unrestricted control of the legislature. *State v. Douglas*, 26 Wis. 428; *People ex rel. Brown v. Woodruff*, 32 N. Y. 365.

W. H. Timlin, for the respondent, argued, among other things, that that part of the act of 1889 extending the term of office of the city attorney was unconstitutional. *Cole v. Black River Falls*, 57 Wis. 110; *People ex rel. Lord v. Crooks*, 53 N. Y. 648; *People ex rel. Williamson v. McKinney*, 52 id. 374, 383; *People ex rel. Fowler v. Bull*, 46 id. 57; *State ex rel. Perry v. Arrington*, 18 Nev. 412, 424. Where, during a term, an act is passed extending the term of office, it must be understood as extending the term of the person elected next after the passage of the act. *State ex rel. Knox v. Hadley*, 7 Wis. 700; Meachem, Pub. Off. secs. 387, 399.

NEWMAN, J. No question is made of the power of the legislature to change the term of the office of city attorney of the city of Milwaukee so as to make it a term of four years, instead of a term of two years, as theretofore. The debate is upon the question of the power of the legislature to extend the term of office of the then incumbent of the office from two years to four years.

The constitution of the state (art. XIII, sec. 9) provides: "All city, town, and village officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of such cities, towns, and villages, or some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose."

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The words of the provision are so plain, and its intention is so obvious, that it does not seem to admit of construction. The idea which the words express on their face is the law. All city officers must be elected by the electors of the city, or they must be appointed by some officer or other authority of the city which has been theretofore designated by the legislature for that purpose. This is the only constitutional source of title to a city office. If the legislature shall have failed to designated some officer or authority of the city to make such appointment, then all city officers must be elected by the electors. It is plain, therefore, that this provision takes from the legislature the power to appoint any city officer. An act of legislature which should attempt to appoint such an officer would be in disobedience of the constitution, and void.

The office of city attorney existed before the constitution was enacted. It has not been created since. The territorial charter of the city of Milwaukee provided for a city attorney, to be appointed by the common council. His duties were not defined with much detail, but the office was recognized. It is, then, one of the city offices which are within the provisions of the constitution. *C. & N. W. R. Co. v. Langlade Co.* 56 Wis. 614; *People ex rel. Brown v. Woodruff*, 32 N. Y. 355.

So the decisive question is whether the provision of the act of 1889 which declared the term of office of the then incumbent of the office of city attorney of the city of Milwaukee to be extended two years was, in substance and effect, an appointment of the then incumbent to that office for the term of two years. If he should hold the office for that term of two years, would his tenure be by virtue of appointment by the legislature, or would it be by virtue of his election to the office for a previous term, which had expired? If it would be by virtue of the appointment, then it would be in disobedience of the constitution and

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wrongful. If it could be by virtue of the previous election, it could be supported as lawful. But the incumbent had been elected to and was serving a term of two years. This term would expire, by limitation of law, on the third Tuesday of April, 1890. The incumbent was elected for that term. His election was for that term, and had no force or validity beyond it. For that occasion and purpose, the constitutional and statutory powers conferred had been fully exercised and spent. The office could not be held by virtue of the election beyond the term then limited by law. To hold the office after the expiration of that term was to hold it again and anew. To hold it again and anew required a new dispensation of title to hold it. The constitution limits the derivation of title to two sources,— to the electors, or to some municipal authority previously designated for that purpose. So, to hold the office again and anew, he must be elected anew, or appointed by the proper municipal authority; otherwise his authority is not derived from a constitutional source. To hold the office in any other way than by election or by constitutional appointment is to hold it in a way that is in disobedience of the constitution and invalid. *People ex rel. Fowler v. Bull*, 46 N. Y. 57; *People ex rel. Williamson v. McKinney*, 52 N. Y. 374. Clearly the appellant had no color of title even to hold the office after the expiration of the two years term to which he was elected, except this statute. The act of the legislature was invalid to extend the term.

No account is made of the right which the incumbent has to hold beyond his term until his successor is elected and qualified. The appellant's claim is not based upon that right, but upon the power of the legislature to extend the term.

As the law was before the enactment of ch. 35, Laws of 1889, the next regular election for city attorney was appointed to be held on the first Tuesday in April, 1890.

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That law was not in terms repealed by ch. 35, Laws of 1889, nor was any different date fixed for the next election. If any change of the time when the election for the next term of the office should be held was intended, it can only be inferred from the void provision extending the term. But this void provision is not ground upon which an implied repeal of the former law can be based, nor for any change not expressed in the statute. *People ex rel. Williamson v. McKinney*, 52 N. Y. 379.

No other time being fixed therefor by law, the act took effect from the time of its publication, and operated to extend the term of the person elected at the election next ensuing its enactment. *State ex rel. Knox v. Hadley*, 7 Wis. 700. That term began on the third Tuesday of April, 1890, and ended on the third Tuesday of April, 1894. The relator was elected at the municipal election held on the first Tuesday of April, 1894. He has qualified, and is entitled to hold the office.

By the Court.— The judgment of the circuit court is affirmed.

BAKER, Plaintiff in error, vs. THE STATE, Defendant in error.

May 8 — May 25, 1894.

CRIMINAL LAW AND PRACTICE. (1) *Extradition: Abduction.* (2) *Plea in abatement: Withdrawal of plea to merits.* (3, 4) *Change of venue: Prejudice of judge.* (5) *Objections to counsel for state: Waiver.* (6) *Jurors: Bias.* (7-9) *Larceny: Amending information: Plea: Election between counts.* (10) *Keeping jury together.* (11) *Remarks by judge: Exceptions.* (12) Habeas corpus: *Deductions from term of imprisonment.*

1. The fact that the defendant in a criminal case was brought into the state forcibly and without extradition papers does not deprive the trial court of jurisdiction.

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2. After having pleaded to the merits and been once tried and convicted, the defendant was allowed to file a plea in abatement, which, however, was overruled and he was again tried on the merits and convicted. *Held*, that he could not raise the objection for the first time in the appellate court that his plea to the merits was withdrawn by the filing of the plea in abatement and that he had never afterwards pleaded to the merits.
3. After having obtained a change of venue on the ground of prejudice of the judge, the defendant cannot upon a new trial have another change on the same ground. R. S. sec. 4680.
4. The fact that after the first trial the judge wrote to the attorney general expressing anxiety as to the correctness of the bill of exceptions and suggesting the aid of certain counsel, did not disqualify him from presiding at the second trial.
5. Objections to the assistant counsel on the part of the state were waived by the defendant when, having been called upon in open court to make any such objection, he failed to do so.
6. A juror stated, on his examination, that from what he had read in the newspapers and heard said about the case he had formed an opinion which it would take evidence to remove; that he was afraid he could not give the testimony the same weight and decide the case the same as though he had no opinion; that he had no prejudice for or against the accused; that he thought he could and would lay aside what he had heard and read, and try the case according to the evidence given in court, and upon that alone; that the opinion he had formed would have no weight as against the testimony which should be submitted in court; and that he felt confident that nothing he had heard or read would bias him in returning a just verdict the same as though he had never heard about the case. There being no other evidence, this court holds that it cannot say, as a matter of fact, that the finding of the trial court to the effect that the juror was indifferent as between the parties was contrary to the evidence, nor, as a matter of law, that the court abused its discretion in permitting him to serve as a juror.
7. Under sec. 4703, R. S., the trial court properly allowed an information for larceny to be amended so as to conform to the proof as to the ownership and amount of the money stolen, the difference in amount being insignificant as bearing on the grade of the offense.
8. The plea of not guilty entered prior to such amendment stood as the plea to the amended information.
9. Where an information for larceny contained two counts which were the same except as to the ownership of the money stolen, it was a matter within the discretion of the trial court whether the prosecution should be required to elect between them.

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10. Upon a trial for larceny a direction that the jury be kept together, and a modification thereof allowing the jurors to attend their places of business with the permission of the court, were within the discretion of the court.

11. Upon a trial for larceny, money taken from the defendant when he was arrested was admitted in evidence. Defendant's counsel having moved to strike it out because it did not appear that it was part of the money stolen, the trial court said "I think the evidence introduced upon the part of the state shows to us that it is a portion of the money taken at that time; consequently the motion is denied." A general exception by defendant is construed as applicable only to such denial of the motion, and not to the fact that the court expressed an opinion upon that branch of the evidence; and the remark itself is *held* to have been manifestly intended merely as a statement that the evidence tended to prove that it was a part of the money taken.

12. Where, upon a second trial, the defendant is a second time convicted and sentenced, and is confined by virtue of the judgment, this court cannot, on a writ of *habeas corpus*, inquire into, and deduct from the second sentence, time served under the first or any diminution to which he may be entitled on account of good behavior, under ch. 238, Laws of 1880.

ERROR to the Circuit Court for *Ashland* County.

On or about September 20, 1889, the Iron Exchange Bank of Hurley held, as a special deposit, about $40,000, which was on that day stolen therefrom. Upon complaint made to the judge of the municipal court of Ashland, November 26, 1889, to the effect that the plaintiff in error, *E. W. Baker*, had committed said offense, a warrant was issued and said *Baker* was arrested. Upon an examination had before said judge, he was, on December 4, 1889, held for trial in said municipal court. On February 10, 1890, an information was filed against the said *E. W. Baker* and one Phelps Perrin, the second count of which was in the words and figures following, to wit:

"Second count: And I, George P. Rossman, district attorney as aforesaid, do hereby further inform the court that on the 20th day of September, A. D. 1889, at the

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town of Vaughn, in said Ashland county, Phelps Perrin and *E. W. Baker* did feloniously steal, take, and carry away thirty-nine thousand one hundred and sixty dollars ($39,160), lawful money of the value of thirty-nine thousand one hundred and sixty dollars ($39,160), the money of the Ashland Iron Mining Company, a corporation organized and existing under and by virtue of the laws of Michigan, then and there being found, against the peace and dignity of the state of Wisconsin.

"GEORGE P. ROSSMAN, District Attorney.

"Dated Feb. 10, A. D. 1890."

Said *Baker* thereupon put in a plea in abatement, which was overruled by the said municipal court, and thereupon the said *Baker* pleaded not guilty, and thereupon and in February, 1890, the said *Baker* filed an application for a change of the venue upon an affidavit of prejudice of the judge, and thereupon an order was entered changing the place of trial of said action to the circuit court for Ashland county. Subsequently the said *Baker* was separately tried in the circuit court for Ashland county, and at the close of such trial, June 25, 1890, the jury returned a verdict to the effect that the said *Baker* was guilty of the offense as charged in the said second count of the information made and filed therein. Judgment being entered thereon and the said *Baker* sent to the state prison, the case was brought to this court on writ of error, and November 17, 1891, the same was reversed and the cause remanded for a new trial. 80 Wis. 416.

Pursuant to the mandate of this court, and on or about February 1, 1892, the said circuit court ordered said *Baker* from the state prison to Ashland county for trial at the February term of said court for 1892. Thereupon the said *Baker* put in a new plea in abatement on seven different grounds mentioned, the sixth of which was to the effect that, at the time of his arrest, he was a resident of Iron-

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wood, Mich., and was brought to Wisconsin without extradition papers and without due process of law, but forcibly and under duress. The state demurred to all of said pleas except the sixth, and traversed that. The court sustained such demurrer, and, the defendant having failed to prove that he was thus brought forcibly from Michigan, that portion of the plea was overruled. *Baker* thereupon filed a petition to remove said cause to the circuit court of the United States for the western district of Wisconsin, and the state answered said petition for removal, and the court denied such application. *Baker* then asked to amend his original plea in abatement, but the same was denied by the court.

On March 3, 1892, the said second count of said information was amended by the district attorney so as to read, after the entitling of the same, as follows, to wit:

"I, Richard Sleight, district attorney of Ashland county, hereby inform the court that on the 20th day of September, A. D. 1889, at the town of Vaughn in said county, Phelps Hill, alias Phelps Perrin, and *Edward W. Baker* did forty thousand six hundred and eighty dollars ($40,680), lawful money of the United States, of the value of forty thousand six hundred and eighty dollars ($40,680), twenty-six thousand seven hundred dollars ($26,700) of which said money was the money and property of the Ashland Iron Mining Company, a corporation organized and existing under and by virtue of the laws of Michigan, and thirteen thousand nine hundred and eighty dollars ($13,980) of which said money was the money and property of the Germania Iron Mining Company, a corporation organized and existing under and by virtue of the laws of Wisconsin, all of which said money was then and there found, feloniously steal, take, and carry away, against the peace and dignity of the state of Wisconsin. RICHARD SLEIGHT, District Attorney.

"Dated March 3, A. D. 1892."

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Thereupon the trial of the said cause upon the merits proceeded, and at the close thereof, March 10, 1892, the jury returned a verdict which, omitting the title of the cause, is as follows, to wit: "We, the jury impaneled and sworn to try the issues in the above-entitled action, do find the above-named defendant, *Edward W. Baker*, jointly impleaded against with Phelps Hill, alias Phelps Perrin, guilty of the offense as charged in the amended information herein." On March 11, 1892, the defendant moved the court to set aside said verdict and grant a new trial, but the same was denied. Thereupon the court entered judgment against said *Baker* in the words and figures (omitting the title) following, to wit: "Sentence by the court: It is hereby adjudged that you, *Edward W. Baker*, be sentenced to be confined at hard labor in the state prison at Waupun by the warden thereof for the period of five years, the first day of your imprisonment therein and the 20th day of September of each year thereafter during your term of sentence to be solitary confinement. The term of your sentence shall begin at noon to-day. Let the sheriff of Ashland county put this sentence into execution. [Signature, etc.]

"Dated this 11th day of March, A. D. 1892."

To reverse that judgment the said *Baker* has sued out this writ of error.

Rublee A. Cole, for the plaintiff in error, contended, *inter alia*, that the court erred in permitting the juror Wentworth to sit as a juror. *Trial of Aaron Burr*, 4 Causes Celebres, 415, 464; *Coughlin v. People*, 144 Ill. 140; *Reynolds v. U. S.* 98 U. S. 145; *Schoeffler v. State*, 3 Wis. 823; *Stephens v. People*, 38 Mich. 743; *People v. Barker*, 60 id. 277; *Washington v. Comm.* 13 Va. L. J. 861; *Thurman v. State*, 27 Neb. 628; *Miller v. State*, 29 id. 437; *Marion v. State*, 20 id. 233; *Fouts v. State*, 7 Ohio St. 472; *Erwin v. State*, 29 id. 186; *Frazier v. State*, 23 id. 551; *McHugh v. State*, 38 id. 155; *Freeman v. People*, 47 Am. Dec. 216;

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Smith v. Eames, 36 id. 515; *People v. Mather*, 21 id. 122; *Rothschild v. State*, 7 Tex. App. 519; *People v. Bodine*, 1 Denio, 304; *State v. Brooks*, 92 Mo. 542; *People v. McQuade*, 110 N. Y. 284. The amendments allowed to the information inserted a new offense, and made it state two distinct offenses in one count. *In re Allison*, 13 Colo. 525; *Ben v. State*, 58 Am. Dec. 234. The court should not have proceeded with the amended information without requiring a new plea. *People v. Corbett*, 28 Cal. 329; *People v. Gaines*, 52 id. 479; *People v. Lightner*, 49 id. 226; *People v. Bowman*, 81 id. 566, 569; *State v. Saunders*, 53 Mo. 234; *State v. Montgomery*, 63 id. 296; *Douglass v. State*, 3 Wis. 820.

For the defendant in error there was a brief by the *Attorney General* and *J. M. Clancey*, Assistant Attorney General, and oral argument by the *Attorney General*. To the point that the objections to the juror Wentworth were properly overruled, they cited *Schoeffler v. State*, 3 Wis. 823; *Staup v. Comm.* 74 Pa. St. 458; *State v. Collins*, 70 N. C. 241; *Epes v. Comm.* 5 Grat. 676; *Little v. Comm.* 25 id. 921; *Comm. v. Webster*, 5 Cush. 295; *Sanchez v. People*, 4 Parker, Crim. Rep. 535; *Monroe v. State*, 23 Tex. 210; *People v. King*, 27 Cal. 507; *State v. Lawrence*, 38 Iowa, 51; *State v. Potter*, 18 Conn. 166.

Cassoday, J. As indicated in the foregoing statement, *Baker* and Perrin were together charged with the larceny. They pleaded separately, and each secured a separate trial, but were both convicted nearly four years ago. Such judgment against Perrin was affirmed by this court, November 17, 1891. *Perrin v. State*, 81 Wis. 135. On the same day the judgment against *Baker* was reversed for the reasons given in the opinion by Mr. Justice Winslow in the case. *Baker v. State*, 80 Wis. 416. *Baker* was again tried and convicted a little over two years ago, and the

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judgment entered therein is now here for review on this writ of error.

1. It is alleged in the plea in abatement put in just before the last trial, in effect, that the trial court was without jurisdiction because *Baker* was brought into Ashland county from Michigan forcibly and without extradition papers. Assuming such to be the facts, still that would not have deprived the trial court of jurisdiction. *Ker v. People*, 110 Ill. 627, affirmed, *Ker v. Illinois*, 119 U. S. 436; *Mahon v. Justice*, 127 U. S. 700. In each of these cases the prisoner was kidnaped and then brought within the jurisdiction of the trial court. To the same effect: *Lascelles v. Georgia*, 148 U. S. 537; *State ex rel. Brown v. Stewart*, 60 Wis. 587. But in the case at bar such portion of the plea in abatement was denied and put in issue by the state; and, since *Baker* failed to offer any evidence that he was so forcibly brought into Ashland county and the state, it must be assumed that he voluntarily came within the jurisdiction of the trial court. So, upon the record before us, the question presented is really not in the case.

2. To the balance of the plea in abatement the state demurred, and the trial court appears to have properly sustained the demurrer. But the contention is that the allowance by the court of such plea in abatement to be filed just before the last trial operated as a withdrawal of the plea of not guilty entered prior to the first trial. In support of such contention, counsel cite the statute requiring a plea in abatement to be filed "before pleading to the merits" (sec. 4654, S. & B. Ann. Stats.), and also cites *Martin v. State*, 79 Wis. 165; *Baker v. State*, 80 Wis. 416; *Ryan v. State*, 83 Wis. 486. But none of these cases support any such contention. The original plea in abatement, filed before pleading to the merits, was held bad on its face when the case was here before. However irregular it may

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have been for the trial court to allow *Baker* to file a new plea in abatement after having pleaded to the merits, and just before the last trial, yet it was granted at his request and as a favor to him, and he is in no position to take advantage of such irregularity. While a right to plead in abatement may be waived by pleading to the merits, yet it does not follow that a plea to the merits is to be deemed waived or withdrawn by subsequently filing a plea in abatement. Dilatory pleas are not favored in the law, whereas pleas in bar and to the merits are favored. *Hooker v. Greene*, 50 Wis. 276, 277. Certainly no such question can be raised for the first time in this court.

3. Error is assigned because the trial court, just before the last trial, refused to change the venue on the ground of the prejudice of the trial judge, as required by sec. 4680, R. S. But, as appears in the foregoing statement, *Baker* had two years before obtained one change of venue upon the same ground, and the section of the statute last cited expressly provides that "not more than one change of venue shall be awarded in any cause." So sec. 4679, R. S., provides that "the party accused shall be entitled to a change of venue but once and no more." These provisions were both considered in *Martin v. State*, 35 Wis. 294, and it was there expressly held that, "when the defendant in a criminal prosecution has obtained a change of venue for the cause mentioned in either of those sections, he cannot have another change either for the same cause or for that mentioned in the other section." Thus it appears that the trial court had no statutory authority to award such change of venue, and certainly he had no such authority independent of and contrary to the statute. It may have been embarrassing for the judge to preside on the trial after the filing of the affidavit of his prejudice; but he appears to have acted conscientiously and fairly, according to his sense of duty, and we perceive nothing censurable in his

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conduct. The mere fact that he wrote a letter to the attorney general exhibiting some anxiety as to the correctness of the former bill of exceptions, and suggested the propriety of his being aided by counsel who represented the state upon the former trial, did not disqualify him from presiding.

4. On December 29, 1891, the trial court, in pursuance of a stipulation between the attorneys representing the state and the defendant, *Baker*, respectively, made an order to the effect that G. W. Cate and R. A. Cole be appointed as attorneys for *Baker*, and be paid at public expense, and that such appointment should begin as of January 23, 1891, and that such stipulation should be enforced by the court, as far as lawful and right so to do. On February 15, 1892, the defendant having claimed that he had been coerced into waiving his right to object to counsel who had appeared in behalf of the state, the court made two orders, to the effect that all orders based on such stipulations be and the same were thereby vacated and set aside; and *the court thereupon called upon the defendant and his said counsel in open court to raise any objections to counsel on the part of the state;* and the said counsel for *Baker* and each of them *having failed to make any such objection*, it was ordered that said Rossman, who had previously been appointed as counsel to assist the district attorney, be continued in that capacity for the then present trial of this case in that court only; and, the defendant having requested that W. W. O'Keefe and R. A. Cole be continued as counsel to defend him at public expense, it was thereby ordered that they be permitted to serve in that capacity, and continue in the defense of the action at the expense of the county, but for that trial and in that court only. Such being the record, it is very manifest that there is no reversible error in the making of such orders.

5. Error is assigned because the court allowed a man by

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the name of Wentworth to become a juryman. He was sworn and examined as to his qualifications to act as such juryman, and testified to the effect that he had never heard any testimony in the case; that he had no personal knowledge of the facts upon which the case depended; that he never saw *Baker* before; that from what he had read in the newspapers and heard said about the case he had formed an opinion which it would take evidence to remove; that he was afraid he could not give the testimony the same weight and decide the case the same as though he had no opinion; that he had no prejudice for or against the accused; that he thought he could and would lay aside what he had heard and read, and try the case according to the evidence given in court, and upon that alone; that he understood the burden of proof was upon the state; that he felt satisfied that he could try the defendant upon the evidence alone, and would be obliged to do so; that he would determine the guilt or innocence of the accused upon the testimony, and that alone; that he would set aside the opinion he had formed as against the testimony; that such opinion would have no weight as against the testimony which should be submitted in court; that nothing he had read or heard would bias him in returning a just verdict, the same as though he had never heard about the cause,— of that he felt confident.

The facts bring the case very near, if not upon, the border line. In all such cases the safer practice is for the trial court to excuse the person from sitting upon the jury whenever there is any reasonable doubt as to his impartiality. The question recurs whether it was error to allow Mr. Wentworth to become a juryman. It must be conceded that in all criminal prosecutions the accused enjoys the right "to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed." Sec. 7, art. I, Const. Wis.; *State ex rel. Lar-*

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kin v. Ryan, 70 Wis. 681. Upon the facts stated, can we say, as a matter of law, that Wentworth was not an impartial juror within the meaning of this constitutional guarantee? Counsel for the accused seems to rely very much upon the decision in *Coughlin v. People*, 144 Ill. 140. In that case, as we understand it, there was less reason for holding the two jurymen to be impartial, than in the case at bar, but, notwithstanding that fact, two of the justices dissented. The question is there learnedly discussed in both the majority and minority opinions. As indicated, we agree with that court to the extent of holding that the juryman must be impartial, but we are unwilling to hold that "he should be wholly free, even from the *suspicion* of bias," in order to be qualified to sit. Certainly the qualification of a person to sit as a juryman must depend upon the partial or impartial condition of his own mind, and not upon the existence or nonexistence of a suspicion of bias against him in the mind of some other person. How and by whom is the fact of such mental condition to be determined in a case like this?

In *Schoeffler v. State*, 3 Wis. 823, it was held that "challenge to the favor involves a question of fact, to be determined by triers. It involves facts which do not necessarily of themselves disqualify the juror, but may do so, according to the state or condition of mind produced by them. An opinion formed or a bias entertained upon merely hypothetical grounds, such as, if what the juror has heard or read be true, if he is personally inimical, etc.,—all such are causes of challenge to the favor wherein the law pronounces no absolute judgment, but leaves the question to be determined by triers, which question is, Does the juror stand indifferent between the parties? . . . The truth of the facts alleged as ground of challenge to the favor, as well as their effect upon the mind of the juror, is to be determined by triers. In case triers are not demanded by the

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parties, or ordered by the court, a challenge to the favor may be determined by the court." In this state it has long been the practice, sanctioned by an early statute, for the trial court to determine such qualification without the aid of triers. S. & B. Ann. Stats. sec. 2849. The statute also declares that "it shall be no cause of challenge to a juror, that he may have obtained information of the matters at issue through newspapers or public journals, if he shall have received no bias or prejudice thereby; or that he is an inhabitant of or liable to pay taxes in a county interested in the action." S. & B. Ann. Stats. sec. 2850. A similar statute under a like constitutional provision in Illinois has been held to be valid. *Spies v. People*, 122 Ill. 1; *Spies v. Illinois*, 123 U. S. 131; *Coughlin v. People*, 144 Ill. 140. Even in the case last cited it was, in effect, held that under such statute the competency of a juror was a judicial question, to be determined by the court from the evidence. In Pennsylvania it has been held that "where impressions are formed on rumor or newspaper statements which the juror feels conscious he can dismiss, or has no fixed belief or prejudice, and can say he can fairly try the prisoner on the evidence freed from the influence of the impressions, he is competent." *Staup v. Comm.* 74 Pa. St. 458; *Comm. v. Taylor*, 129 Pa. St. 534. In *Reynolds v. U. S.* 98 U. S. 156, WAITE, C. J., speaking for the whole court, said "that upon the trial of the issue of fact raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the court upon that issue ought not to be set aside by a reviewing court unless the error is manifest. No less stringent rules should be applied by the reviewing

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court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that, upon the evidence, the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the conscience or discretion of the court." To the same effect: *Spies v. Illinois*, 123 U. S. 179; *People v. McGonegal*, 136 N. Y. 62; *Phelps v. People*, 72 N. Y. 334; *State v. Cunningham*, 100 Mo. 382; *State v. Elkins*, 101 Mo. 344; *State v. Williamson*, 106 Mo. 162; *State v. Gray*, 19 Nev. 212; *Kumli v. Southern Pac. Co.* 21 Oreg. 505. For other cases to the same effect, see the brief of the attorney general.

The opinion of Mr. Wentworth, based upon what he had read in the newspapers and heard, as stated, was, as aptly held in *Schoeffler v. State*, 3 Wis. 823, nothing more than "a bias entertained upon merely hypothetical grounds;" that is to say, it was entirely dependent upon the truthfulness of what he had so read and heard. There is no evidence as to the effect of what he had so read and heard upon his mind except his own sworn statements and his appearance upon the stand, and the trial court was in a far better position to weigh and determine the truthfulness of such evidence than this court can be. Within the rule sanctioned by so many adjudications, we cannot hold, as a matter of fact, that the finding of the trial court to the effect that the juror was indifferent as between the parties was contrary to the evidence, nor, as a matter of law, that the court abused its discretion in permitting him to become a juryman. Since most intelligent people are supposed to read in the newspapers the account of the current events in the county where they reside, it is impracticable, and would defeat the ends of justice, to exclude from juries all persons who happen to entertain an impression or opinion from

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what they have so read. The exception to allowing Wentworth to sit upon the jury is overruled.

6. The second count of the original information is given in full in the foregoing statement. The first count in that information was substantially the same, except that "Chauncey H. Crosby, vice president of the United States Express Company, an unincorporated joint stock association organized and existing in the state of New York and having its principal place of business in the city of New York, in the state of New York," is alleged to have been the owner of the money stolen, instead of the Ashland Iron Mining Company, as stated in the second count. On the first witness being called for the state, *Baker's* counsel requested the state to elect upon which count the prosecution would proceed. Thereupon the district attorney elected to proceed upon the second count. *Baker's* counsel then moved to quash that count, which motion was denied. Thereupon *Baker's* counsel objected to any evidence under the second count, on the ground that it did not state facts sufficient to constitute a cause of action. Thereupon the state, with the consent of the court so to do, withdrew such election, and proceeded upon the original information containing both counts. *Baker's* counsel then objected to any evidence under such information, and moved to quash the same, for the reason that it alleges the ownership of the property in two different persons, without alleging that either had any special interest therein; which objection and motion were severally overruled. The trial proceeded, and, after considerable testimony was taken, the state, with the consent of the court, amended the second count of the information so as to conform to the testimony taken, and so as to read as set forth in the foregoing statement, wherein it is alleged that the whole amount of the money so stolen was $40,680, of which $26,700 was the property of the Ashland Iron Mining Company, and $13,980 the property of

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the Germania Iron Company; and the first count in the original information was withdrawn. Numerous objections and motions were made upon the part of *Baker* to such amendments and changes of the information, but we are constrained to hold that they were each and all properly overruled. As the trial court properly held, there was but one offense charged or proved, and that was the offense of grand larceny. The amendments, so far as *Baker* was concerned, all related to the amount of money stolen and the ownership of the same. Our statute expressly declares that: "Any court of record in which the trial of an indictment or information is had, may forthwith allow amendment in case of variance between the statement in the indictment or information and the proof, in the following cases: In the name or description of any person, place, or premises, or of any thing, writing, or record, *or the ownership of any property described in the indictment or information*, and in all cases where the variance between the indictment or information and the proof are not material to the merits of the case." R. S. sec. 4703. The amount or value of the money stolen only becomes important on a trial for the offense, when it is necessary to fix the grade of the offense. *Phelps v. People*, 72 N. Y. 334. Here, the difference in the amount named in the original information and that named in the second count as amended is of no significance as bearing upon the offense charged. It is, of course, well that the person having the general ownership of property stolen should be named in the information as such owner, but it seems to be sufficient if the bailee or person having a special property therein be named as owner. *Ibid.* The right of the trial court to amend the information in the manner indicated seems to be very clear under the statute. *Miller v. State*, 25 Wis. 384. The question whether the prosecution should have been required to elect

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upon which count the state would rely, was certainly within the discretion of the trial court. *Martin v. State*, 79 Wis. 165. The plea of not guilty, entered by *Baker* prior to such amendment, continued to stand as the plea of not guilty to the second count as amended. *Rasmussen v. State*, 63 Wis. 1.

7. The direction to the officer in charge to keep the jury together was manifestly within the discretionary powers of the trial court. The same is true respecting the modification of such direction so as to allow jurymen to attend their respective places of business with permission of the court.

8. The money, etc., taken from *Baker* when he was arrested, and identified as such, was properly admitted in evidence against an objection that it was immaterial, irrelevant, and incompetent, and the court properly refused to strike it out. In answer to the suggestion of *Baker's* counsel to the effect that such money, etc., did not appear to be a part of the property or funds taken from the Iron Exchange Bank at the time of the robbery in question, the court said: "I think the evidence introduced upon the part of the state shows to us that it is a portion of the money taken at that time; consequently the motion is denied." The record simply shows "exception by defendant." This exception must be construed as applicable only to such denial of the motion, and not to the fact that the court expressed an opinion upon that branch of the evidence. If that expression of opinion was deemed objectionable, it was no more than fair to the court that counsel should have called specific attention to it, and then it might have been withdrawn or corrected at the time. *Gilchrist v. Brande*, 58 Wis. 184. Besides, the remark was by way of answer, and addressed to counsel, and not to the jury, and manifestly was intended as merely saying that the evidence on

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the part of the state tended to prove that it was a part of the same money. *Ibid.* Otherwise the court would not have submitted the question to the jury.

9. Numerous exceptions are taken to the charge of the court, but the law of the case was pretty fully settled when it was here before, and the charge seems to be full and fair and in conformity with the opinion of this court in the case.

10. Counsel asks that *Baker* be discharged on *habeas corpus*, on the ground that he has served out his term of imprisonment. As indicated in the foregoing statement, he was sentenced March 11, 1892, for the term of five years. That is conceded to be the limit of imprisonment for such an offense. S. & B. Ann. Stats. sec. 4415. The contention is that, under ch. 238, Laws of 1880 (sec. 4928*a*, S. & B. Ann. Stats.), *Baker* is by good behavior entitled to a diminution of his sentence down to three years and nine months; and that, by counting the time actually served under his present sentence and also under his former sentence, he has served the time last mentioned. But that cannot be so, since the first judgment was reversed November 17, 1891. The time during which he was not under sentence cannot be counted on any theory. Assuming that the statute last cited is a valid enactment, which is, to say the least, a question of very grave doubt, and assuming that his conduct has been good up to the present time, yet by the very terms of the act he is still liable to forfeit and be deprived of all the time he has earned by good conduct. The theory of the act seems to be that it shall be administered by the warden with the consent of the directors. But in such a case this court only possesses appellate jurisdiction. We have no authority to take oral testimony as to credits or forfeitures. Only a little over two years of the sentence before us for review has expired. There is no law authorizing us to deduct from such sentence the time

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he served under the former sentence. Even upon *habeas corpus*, we can only inquire into matters going to the jurisdiction. The statute expressly declares that: "No person shall be entitled to prosecute such writ who shall have been committed or detained by virtue of the final judgment or order of any competent tribunal of civil or criminal jurisdiction," etc. R. S. sec. 3408. The accused stands committed and is now detained by virtue of such a judgment. The court appears to have had jurisdiction of the person and subject matter, and does not appear to have exceeded its authority. This fully answers the application for a *habeas corpus*.

The case has been contested at every turn. Seemingly no objection nor exception has been omitted which zealous, persistent, and indefatigable counsel could devise. It is said that there are more than 1,000 exceptions in the record, and these are grouped under more than forty assignments of error, upon each of which counsel claim to rely. We have patiently listened to more than five hours' argument in behalf of the accused; and, in addition to this lengthy opinion, we have considered the other points, not mentioned, sufficiently to reach the conclusion that they are each and all too finical and inconsequential to require specific consideration in any further written opinion; and hence must severally be regarded as overruled.

By the Court.— The judgment of the circuit court is affirmed, and the application for a writ of *habeas corpus* is denied.

As to the effect of abduction, see cases collected in a note to *Kingen v. Kelly*, 15 L. R. A. 177.— REP.

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THE STATE VS. GRUNKE.

May 8 — May 25, 1894.

Criminal law: Neglect to provide for wife: Jurisdiction of circuit court: Construction of statutes: Misdemeanor or felony? Constitutional law.

1. Sec. 2, ch. 318, Laws of 1887, provides that the several county and municipal courts shall have concurrent jurisdiction with the circuit courts of the offense of neglecting to provide for a wife and minor children. Sec. 4 provides that if the accused is bound over for trial the record shall be transmitted to the county or municipal court, and the accused be ordered to appear before such court for trial. *Held*, that the two sections were not in conflict, and that sec. 4 did not prohibit the circuit court from exercising jurisdiction over the offense. The latter section is to be construed as directing that the record be transmitted to the county, municipal, *or circuit* court.
2. An act is not unconstitutional because it makes an offense a misdemeanor but provides an alternative punishment as for a felony; and the grade of the offense, in such case, is a question for construction.

REPORTED from the Circuit Court for *Sheboygan* County.

The facts are stated in the opinion.

The cause was submitted for the plaintiff on the brief of the *Attorney General* and *J. M. Clancey*, Assistant Attorney General, and for the defendant on that of *D. T. Phalen.*

ORTON, C. J. The defendant was arrested on the complaint of one Albert Hoehne, charging him with having unreasonably refused and neglected to provide for his wife and minor children, being of sufficient ability or able to earn the means of their support. He was brought before the judge of the municipal court of the city of Sheboygan for his examination, and on such examination he was bound over or held to the circuit court of Sheboygan county for trial. The defendant appearing in the circuit court, and

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having been personally arraigned on information for said offense, and having pleaded not guilty, a jury was duly impaneled and sworn to try the case. Thereupon the defendant's attorney moved the court to discharge the defendant on the grounds: First, that the statute providing for said offense and the trial thereof requires the defendant to be bound over to the county or municipal court of Sheboygan county, and that therefore the circuit court of said county has no jurisdiction of the case; second, that the act of the legislature, to wit, ch. 318, Laws of 1887, is unconstitutional. The case having been submitted to the jury on the conclusion of the testimony, the jury found the defendant guilty of the offense charged in the information; whereupon the judge of the court, deeming the question of law arising in the case so important as to require the decision of this court, has reported the case with the following question: "Has the circuit court of Sheboygan county jurisdiction to try the defendant for the offense charged in the information?"

This is a very broad and general question. We may well ask, Why not? What are the grounds on which the jurisdiction of the court is questioned? It may be that the learned judge of the circuit court had in mind only the reason stated by the counsel of the defendant as the ground of the above motion. That reason was that said statute required the defendant to be bound over or held for trial to the county or municipal court of the county, and not to the circuit court. Rather than to dismiss the report on account of the vagueness of the question, we will consider that as the true and only reason why the court had not jurisdiction of the case; that being the only reason appearing in the record.

Sec. 2 of the act provides that the several county and municipal courts shall have concurrent jurisdiction with the circuit courts of the offense, and shall be deemed open

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at all times to hear, try, and determine all cases arising under this act. Sec. 4 provides that when, on such examination, the accused shall be bound over or held for trial, the record shall be forthwith transmitted to the county or municipal court, and the accused be ordered to appear before such court for trial, and the district attorney shall file information, etc. Do these sections conflict? The first clearly gives to the circuit courts jurisdiction over this offense with the county and municipal courts, and the other section does not take that jurisdiction away from the circuit courts. Then they do not conflict. Sec. 4 leaves the jurisdiction of the circuit court over this offense as sec. 2 has recognized or conferred it. The circuit courts are given original jurisdiction of all matters civil and criminal within the state, not excepted in the constitution, and not thereafter *prohibited* by law, by sec. 8, art. VII, of the state constitution. Sec. 4 of this act does not *prohibit* the circuit courts from having jurisdiction over this offense, and they therefore yet have it by the constitution. By the statute (sec. 2420, R. S.) the circuit courts "have the power to hear and determine, within their respective circuits, all cases of crimes and misdemeanors of every kind." Sec. 4 of this act does not alter, amend, or repeal this statute.

Ch. 162, Laws of 1851, creates or defines the misdemeanor of selling spirituous and intoxicating liquors, etc., and sec. 6 provides that "justices of the peace shall have power to hold a court to hear, try, and determine all offenses against or growing out of the provisions of this act and arising within their respective counties; provided that the accused party shall not be deprived of a jury trial nor of his right of appeal." *Allen v. State*, 5 Wis. 329, arose from an indictment for the above offense in the circuit court. The principal ground of demurrer to the indictment was that the circuit court had no original jurisdiction of the offense. This court held that the jurisdiction of

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the circuit court of all matters civil and criminal within the state, conferred by the above provision of the constitution, was not prohibited or taken away by said act. Ch. 179, Laws of 1874, created the offense of keeping and maintaining a saloon or restaurant where intoxicating liquors are sold in violation of law. Sec. 6 gave justices of the peace jurisdiction to hear, try, and determine all cases arising under the act. In *Faust v. State*, 45 Wis. 273, there was a motion to quash the information in the circuit court under the above act, on the ground that the circuit court had no jurisdiction of the offense. It was held that the jurisdiction of the circuit courts, conferred by the above provisions of the constitution and by the general statutes, was not taken away by said act, and could not be without some express declaration excluding it.

These cases are in point. This section 4 contains no language giving exclusive jurisdiction to the county and municipal courts, or excluding or prohibiting that of the circuit courts. Construing sections 2 and 4 together, section 4 is, in effect, as if it read: "To the county, municipal, or *circuit court* of the county."

The brief of the defendant's counsel contains some other stray points not properly within the report. First, the act does not confer criminal jurisdiction on the "probate courts of the state," but on the *county* courts, and we are not referred to any part of the constitution that is violated by it. Second, the act does expressly provide for a jury trial in sec. 6. Third, the judge of the municipal court of the city of Sheboygan had authority to cause the arrest of the accused, and to take the examination as a "judge of a court of record," and the record states that a preliminary examination was had before him. Fourth, the act is not unconstitutional on the ground that it makes the offense a misdemeanor and fixes upon it the punishment of a felony. The act inaptly makes the offense a misde-

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meanor, and makes an alternative punishment one year in the state prison. It is not perceived wherein the constitution is violated in this. It is a question of construction whether the offense is a misdemeanor or shall be deemed a felony.

By the Court.— The question is answered in the affirmative, and the cause remanded for further proceedings according to law.

KLIEFORTH and another, Plaintiffs in error, vs. THE STATE, Defendant in error.

May 8 — May 25, 1894.

Criminal law: Game laws: "Night time."

The question being whether a duck was shot in the night time in violation of sec. 14, ch. 106, Laws of 1893, an instruction fixing the end of night and the commencement of day at exactly one hour before sunrise was erroneous. If there was daylight enough to discern a man's face it was day time; otherwise not.

ERROR to the Circuit Court for *Dodge* County.

The plaintiffs in error were convicted in the circuit court for Dodge county upon a complaint charging them with assault and battery upon one F. M. Lamb, alleged to have been committed upon the 1st day of September, 1893. On the morning of that day, said Lamb was shooting ducks upon the Horicon marsh, and, at some time between the hours of 4 and 5 o'clock in the morning, shot and killed a duck. *Klieforth* was game warden, and as such arrested Lamb within a few minutes after the shot was fired. Under the statute of this state a game warden is authorized to arrest any person, without a warrant, whom he finds in the act of shooting ducks "in the night time." Laws of

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1891, ch. 436, sec. 2; also, Laws of 1893, ch. 106, secs. 1, 2, 14. *Cummings* assisted *Klieforth* in making said arrest.

It seems to have been conceded in the circuit court, upon the part of the plaintiffs in error, that they were guilty of the crime charged in the complaint, unless the shooting in question was committed in the night time; and, upon the part of the state, it was conceded that they were not guilty unless the proof showed that the shooting in question was done in the day time. Therefore, the case resolved itself into one single question of fact, namely, Did Lamb commit the act of shooting the duck in question in the night time or in the day time? If in the night time, the plaintiffs in error were not guilty. If in the day time, they were guilty of committing the assault and battery charged.

The evidence on behalf of the state tended to show that the duck was shot at 4:30 o'clock A. M., and the arrest was made a few minutes thereafter. On behalf of the defense, there was evidence that the duck was shot at 4:04 A. M., and the arrest was made at 4:11. The evidence showed that the sun rose at 5:21. Among the instructions, the circuit judge instructed the jury as follows: "So, when you come to the question of whether it was daylight or not, it is somewhat vague. Therefore, I think that you had better confine yourselves, in your deliberations, to the question of time. If you find that the duck was shot before 4:21 in the morning, then it was shot in the night. If it was shot after that time, it was shot in the day time." To this charge, plaintiffs in error excepted. A verdict of guilty was rendered, and from judgment thereon the defendants sued out their writ of error.

For the plaintiffs in error there was a brief by *James J. Dick* and *Frank M. Lawrence*, and oral argument by *Mr. Dick*. They contended that the night time is that period of time between the setting and the rising of the sun. Cent. Dict. *verb.* DAY; Webster, Dict. *verb.* NIGHT; Co.

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Litt. 135*a*; *Pulling v. People*, 8 Barb. 385. In Massachusetts, by statute, night time in criminal prosecutions is defined to be "the time between one hour after the sunsetting on one day and one hour before sunrising on the next day." Gen. Stats. ch. 172, sec. 13. But there is no statute or decision in this state defining night time.

For the defendant in error there was a brief by the *Attorney General* and *J. M. Clancey*, Assistant Attorney General, and oral argument by the *Attorney General*. As to when night ends and day begins, they cited *State v. Bancroft*, 10 N. H. 105; *Lewis v. State*, 16 Conn. 32; *People v. Griffin*, 19 Cal. 578; 4 Bl. Comm. 224; *Comm. v. Chevalier*, 7 Dana Abr. 134.

WINSLOW, J. The pivotal question in the case was whether the duck was shot in the night time or in the day time; and the court charged the jury that if it was shot before 4:21 A. M., then it was shot in the night, and if after that time, then it was shot in the day time. This instruction fixed the end of night and the commencement of day at a definite minute of time,—just one hour before sunrise. We have been referred to no authority which sustains this definition of "night," and we think that it must be held erroneous. In the case of burglary, the rule is thus stated by Blackstone (vol. 4, p. 224): "If there be daylight or *crepusculum* enough, begun or left, to discern a man's face withal, it is not burglary. But this does not extend to moonlight." This rule was approved by this court in *Nicholls v. State*, 68 Wis. 416. It is substantially supported by the general current of decisions in those states where, as in Wisconsin, there is no statutory definition. 16 Am. & Eng. Ency. of Law, 707, and cases cited in note 3. We see no good reason for applying one definition to the word in burglary, and another definition in a prosecution for violation of the game laws. It is plain that in view of

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the evidence the erroneous definition given by the court might have been, and probably was, very prejudicial to the defendants' case.

By the Court.— Judgment reversed, and cause remanded for a new trial.

HOFFMAN, Plaintiff in error, vs. THE STATE, Defendant in error.

May 9 — May 25, 1894.

Criminal law and practice: Amending record to show presence of defendant during trial: Murder in third degree.

1. The record in a murder case, which through the neglect of the clerk fails to show that defendant was present at every stage of the trial, conviction, and sentence, may be amended by entries *nunc pro tunc* showing that fact, upon the testimony of the clerk and sheriff, at a subsequent term and after defendant has sued out a writ of error,— he being present and heard on the motion to amend.
2. Under sec. 4345, R. S., defining murder in the third degree as a killing, without any design to effect death, by a person engaged in the commission of any felony, and sec. 4377, making an assault with intent to do great bodily harm a felony, one cannot be convicted of murder in the third degree on the ground that he was engaged in an assault with intent to do great bodily harm upon a person other than the deceased, where the evidence shows that such assault was at an end before the killing occurred.

ERROR to the Circuit Court for *Marathon* County.

The plaintiff in error was tried upon an information charging him with murder in the first degree, by killing and murdering William Herzog with a premeditated design to effect his death, and was found guilty of murder in the third degree, and sentenced to ten years imprisonment in the state prison. He sued out a writ of error, and, after return to this court, it was assigned as error that there was

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nothing in the record to show that the plaintiff in error was personally present in court during the various stages of the trial and conviction. When the writ was sued out and return made, the record showed only that the accused was present when the information was read to him, and at no other time. At a subsequent term of the court, upon notice to the plaintiff in error and his attorneys and by order of the circuit court, the plaintiff in error was brought from the state prison, where he was serving his sentence, to the court room; and on the evidence of the clerk and sheriff, and on motion of the district attorney, after argument on his behalf by his counsel, he being present, the record was amended *nunc pro tunc* so as to show the presence of the plaintiff in error at each and every stage of the trial, conviction, and sentence. The amendment was made solely upon the testimony of the sheriff and clerk as to their recollection of the fact of his presence in court, and without memoranda, minute, or other record from which either of them could refresh his memory. He was then remanded to the state prison, and the action of the circuit court in the premises was duly certified to this court as a part of the record in the cause. The information was filed against Albert Hoffman and Ferdinand Heise, as well as the plaintiff in error, but the two former were discharged at the close of the evidence.

The principal question arising upon the bill of exceptions is whether, upon the facts disclosed in evidence, the plaintiff in error was properly convicted of murder in the third degree. It was contended on the part of the state that, at the time the killing occurred, the plaintiff in error had raised a chair over one Risto's head and made an assault upon him for the purpose of doing him great bodily harm, within the meaning of sec. 4377, R. S.; and that, while engaged in the commission of this felony, he killed the said William Herzog, who had interfered to prevent the

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plaintiff in error from carrying out his design to inflict great bodily harm on Risto, but without any design to effect his death; and that therefore he was guilty of murder in the third degree, under sec. 4345, R. S.; and that *Hoffman's* felonious design and attempt against Risto furnished the implied malice necessary to make the killing of Herzog murder in the third degree.

The killing occurred at a masked ball at a tavern and saloon in Rib Falls, Marathon county. Among the participants in the dance were the defendant and two of his brothers and his sister, and Robert Risto and two of his brothers. The defendant and Herzog were strangers, and first met on that occasion. Some of the parties became very much intoxicated and violent. The defendant and also his brother Albert got into an altercation with Robert Risto in the hall where the dance was proceeding, and the defendant and Risto had each exhibited a knife to the other, by way of caution or threat. Robert Risto and others started down the stairs, and the defendant and his brother followed. As Robert Risto went out of the hall door, he struck Albert Hoffman in the face, and there was a rush down the stairway, and the defendant and his brother Albert caught up with Risto in the hall below, where the stairway landed, and at the door of the saloon there was a struggle, in which the defendant, Albert Hoffman, Robert Risto, and his brother Gust. Risto were engaged. This was suppressed by the wife of the proprietor and others.

The saloon was about 23x27 feet, with an outside door near the middle of the front, and a door in the back of the saloon opened into the liquor room. Going from the saloon there was a hallway about ten feet long, on the left of which is a sitting room, and on the right an alcove, in which there was a wash room, a sink, etc. At the end of the hall is a door opening into the dining room, and going through

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this door there is another to the left, opening into the stairway to a landing, where there is a door opening into the dance hall. In the struggle that ensued when the parties came downstairs into the saloon, it appeared that Robert Risto had snatched a metal faucet out of a beer keg and hurled it at the Hoffmans, striking Albert Hoffman on the hand and inflicting some injury. About eight or ten minutes after this difficulty had been suppressed, during which Robert Risto went outdoors and came in again at the dining room and so into the saloon, words passed and angry demonstrations occurred between him and Albert Hoffman in respect to the injury the latter received on his hand, when another encounter took place, which, though stated somewhat differently by those who saw it, yet with respect to the point material to the case, there does not appear to be any controversy or conflict of testimony. Albert Hoffman and Robert Risto were standing up and making motions to fight with their fists. A Mr. Wolfe testifies: "Then I saw *August Hoffman* take up a chair to strike Risto. Then Herzog, the deceased, took hold of the chair, and *August*, the defendant, let go of it and was going to strike Herzog. He let it go and made motions to strike him. When Herzog took hold of the chair I think he set it down. I think the defendant let go of it. When the defendant took the chair he was about to face Risto, and was about five feet off, and Albert Hoffman made motions to strike Risto. The defendant's back was turned to Herzog, and when the latter seized the chair the defendant turned around and put himself in a parrying position. Herzog let go of the chair and struck at him. I saw him strike the defendant in the face, and saw him fall backward. Herzog stepped up towards the defendant, made a step forward, and knocked him down. The defendant could have struck Herzog if he had wanted to when he first let go of the chair. He had the chair about half-way up when Her-

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zog took hold of it, and it was still moving." The witness Franke, who gave a pretty clear account of the encounter, testified: "I saw Albert Hoffman quarreling with Robert Risto, making motions to hit him. Risto was doing nothing. Then I saw the defendant take up a chair to knock Risto down, and Herzog was standing behind him, and took the chair away from him,—took it by the legs. Defendant let the chair go, and turned around to Herzog, and made motions to hit him. Herzog dropped the chair, and I saw him strike the defendant in the face. He fell down backward, clear to the floor. He jumped up again to his place, and I looked around and saw Herzog fall down near the counter. When the defendant jumped up he jumped to the place where I saw Herzog fall. Then the people rushed together and I couldn't see. Next, saw Heise take a chair and strike Herzog, and then saw Herzog going around the saloon with his hands over his head. We took him over to the barber's chair. When I went into the saloon Albert Hoffman and Risto were quarreling. That was the only thing that looked like a fight. When Herzog took hold of the chair he held it in his hand and said: 'Two against one is too many.' The defendant turned around and made motions to hit Herzog, and he dropped the chair, and I saw that he struck the defendant first." Other testimony showed that when the defendant turned around quickly towards Herzog he said sharply, "What?" and then had no weapon in his hand, so far as the evidence shows; that he said something, or tried to, as the chair was taken from him. It is claimed, and the testimony tends to show, that when the defendant got up after having been knocked down by Herzog he drew his knife, and in the struggle that ensued they both were thrown or fell to the floor, Herzog on top of the defendant; and in the struggle the fatal thrust or cut with the defendant's knife was given, which resulted in Herzog's

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death. There is no evidence showing, or tending to show, that after the chair was taken from the defendant he made any further demonstration against Risto, or that any one did. Risto testified substantially that he went out of the saloon and did not return until after the affray was over. The evidence shows that the assault on Risto by the defendant had ceased before Herzog knocked the defendant, *Hoffman*, down, and clearly so before the latter used any violence upon or against Herzog. There is no testimony in the record to show that any assault was being made or violence directed to or against Risto at the time Herzog knocked the defendant, *Hoffman*, down. The evidence further shows that after Herzog and the defendant fell to the floor, as above stated, they both got up again, and the defendant struck Herzog a blow with a knife or other sharp instrument on the head when he was standing by the counter; that the fatal wound was in the left side of the chest, inflicted with a knife, penetrating the chest to the left of the medial line between the second and third ribs, three-quarters of an inch in length. There was a contused wound back of the upper part of the right ear, and an incised wound in the scalp on the left of the medial line down to the skull. The wound that caused death was the knife wound in the chest.

On the subject of murder in the third degree, the circuit court charged the jury as follows: "Section 4345 reads as follows: 'The killing of a human being, without any design to effect death, by a person engaged in the commission of any felony, shall be murder in the third degree.' You will observe that the prominent features of this statute are that the killing must be done without a design to effect death, and must be done by a person while engaged in the commission of a felony. The word 'felony,' as used in the statute, means an offense or crime punishable by imprisonment in the state prison. It is claimed on the part of the

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state that, just prior to the affray with Herzog, the witness Albert Hoffman was engaged in a quarrel with one Robert Risto, and that the defendant, *August Hoffman*, advanced upon Risto with a chair, and turned to strike him; that Herzog at that time interfered and prevented *August* using the chair on Risto, and then the fatal affray ensued. It is claimed by the state that the defendant was engaged in making an assault upon Robert Risto with intent to do him great bodily harm. If such was the case he was engaged in the commission of a felony, because an assault with intent to do great bodily harm is punishable by imprisonment in the state prison. So, if you find from all the evidence, beyond a reasonable doubt, that the defendant killed William Herzog without a design to effect his death, while he, the defendant, was engaged in committing an assault with intent to do great bodily harm upon Robert Risto, and such killing is not justifiable, then you should find the defendant guilty of murder in the third degree; that the defendant claims, without any provocation on his part, the deceased struck him a violent blow in the face, knocking him down; and that thereupon he struck him a blow with his knife."

For the plaintiff in error there was a brief by *Mylrea, Marchetti & Bird*, and oral argument by *W. H. Mylrea*. They contended, *inter alia*, that there was no authority whatever for the amendment showing that the defendant was personally present in court during the several stages of the trial; that, if permissible under any circumstances, it can only be made when there is some record evidence by which to amend, showing that the amendment is in accordance with the facts. *Makepeace v. Lukens*, 27 Ind. 435; 3 Bl. Comm. 407; 1 Tidd, Pr. 712; *Queen v. Tutchin*, 1 Salk. 51; *Boyd v. Blaisdell*, 15 Ind. 74; *Schoonover v. Reed*, 65 id. 313; *Spafford v. Janesville*, 15 Wis. 474, 477; *Albers v. Whitney*, 1 Story, 312; *Kentzler v. C., M. & St. P. R. Co.* 47 Wis. 641, 646; *State ex rel. Graves v. Primm*, 61 Mo. 167;

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State v. Jeffors, 64 id. 376; *Branger v. Chevalier*, 9 Cal. 351; *Swain v. Naylee*, 19 id. 127; *Dreyfuss v. Tompkins*, 67 id. 339; *Frew v. Danforth*, 126 Ill. 242; *Gebbie v. Mooney*, 121 id. 255; *Dougherty v. People*, 118 id. 160; *Gillett v. Booth*, 95 id. 183; *Dunham v. South Park Comm'rs*, 87 id. 185; *Church v. English*, 81 id. 442; *Howell v. Morlan*, 78 id. 163; *Waldo v. Spencer*, 4 Conn. 71; *Raymond v. Smith*, 1 Met. (Ky.), 65; *Summersett v. Summersett's Adm'r*, 40 Ala. 596; 1 Bish. Crim. Proc. sec. 1343; 20 Am. & Eng. Ency. of Law, 525.

For the defendant in error there was a brief by the *Attorney General* and *J. M. Clancey*, Assistant Attorney General, and oral argument by *Mr. Clancey*. They argued, among other things, that a mere clerical error in the record may be amended, no matter how important a part thereof it may be. Freeman, Judgm. sec. 72; 20 Am. & Eng. Ency. of Law, 524; *Holman v. State*, 79 Ga. 155; *Green v. State*, 19 Ark. 189; *State v. Littlefield*, 3 R. I. 124; *State v. Clark*, 18 Mo. 432; *West v. State*, 22 N. J. Law, 212. The correction may be made after a writ of error has been sued out. *Kelly v. C. & N. W. R. Co.* 70 Wis. 335; *Wyman v. Buckstaff*, 24 id. 477; *Chestnutt v. Pollard*, 77 Tex. 86. And after the term at which the judicial act was performed. *Hill v. Hoover*, 5 Wis. 354. Record evidence is not necessary. *Balch v. Shaw*, 7 Cush. 282; *Bilansky v. State*, 3 Minn. 427; *In re Wight*, 134 U. S. 137; *Rousset v. Boyle*, 45 Cal. 64; *Fay v. Wenzell*, 8 Cush. 315; *Savage v. Blanchard*, 148 Mass. 348; *Gloucester v. Co. Comm'rs of Essex*, 106 id. 579; *Marsh v. McKenzie*, 99 id. 64.

PINNEY, J. 1. It is insisted that under the decision in the case of *French v. State*, 85 Wis. 400, 409, the failure of the record, as it stood at the time the writ of error was sued out and return made, to show affirmatively that the accused was personally present at all the several stages of

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the trial and conviction, requires that the sentence and judgment of the court below should be reversed, and that the subsequent amendment of the record in these respects was without warrant of law and a nullity. The defects and omissions in the record were all the result of failure and neglect on the part of the clerk to make the entries essential to a legal record of the trial of a criminal case. Ought there to be a failure of justice in any such case, either civil or criminal, beyond the power of the court to avert it by proper amendment? There is no statute of amendments applicable to defects in criminal cases such as existed in this record. By the common law it is well established that a court has no power to review or reverse its own judgment of a previous term, and that as to all matters on which the mind of the court acted, or is presumed to have acted, in the rendition of the judgment, it is precluded from again acting at a subsequent term and changing its opinions or altering its decisions. *Ætna L. Ins. Co. v. McCormick*, 20 Wis. 265. But this rule, it is there held, does not preclude the court from correcting clerical errors or mistakes in matters of form, even after the term. The amendments allowed in this case did not go to any subject or matter upon which the mind of the court acted or can be presumed to have acted, but simply to the correction of clerical errors or omissions. Such corrections may always be made, and are not within the rule above stated (*Wyman v. Buckstaff*, 24 Wis. 477); and the court has power, after the term, to correct a mistake in the entry of its judgment, so as to make the record conform to the judgment actually pronounced (*Durning v. Burkhardt*, 34 Wis. 585; *Will of Cole*, 52 Wis. 591; *Williams v. Hayes*, 68 Wis. 248). Errors occurring by mere mistake or inadvertence may in like manner be made to conform to the fact (*State ex rel. Taylor v. Delafield*, 69 Wis. 264), at a subsequent term, even after an appeal has been taken, though technic-

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ally the defendants had the right to avail themselves of the error on appeal at the time it was taken, and to have the appeal determined, so far as the question of costs is concerned, without regard to any subsequent correction of the order appealed from (*Kelly v. C. & N. W. R. Co.* 70 Wis. 335; *German Mut. F. F. Ins. Co. v. Decker*, 74 Wis. 560). But it is believed that no such limitation exists in or would be applicable to a criminal case. 20 Am. & Eng. Ency. of Law, 523, 524, and cases cited.

It is said that no amendment made after the term can be allowed, except by record evidence, or facts appearing in the record itself, by which to make the amendment, and cases are cited to that effect; but other authorities of the highest respectability deny that the court is thus restricted as to evidence. In *Rhoads v. Comm.* 15 Pa. St. 272, it was held that the court had power to supply record evidence *nunc pro tunc* of the forfeiture of a recognizance which, by misprision of the clerk, had not been recorded, GIBSON, C. J., saying: "The old notion that the record remains in the breast of the court only to the end of the term has yielded to necessity, convenience, and common sense. Countless instances of amendment after the term, but ostensibly made during it, are to be found in our own books and those of our neighbors." It savors too much of strict adherence to old notions to hold that the court may not receive any evidence to supply a defect or correct an error in the record that would be received on the trial of an issue to determine any important fact affecting the life, liberty, or property of the citizen. The amount and kind of evidence to satisfy the court as to what the entry should be rests with the court. The cause is heard here upon the record, and this includes, of necessity, the entire record as amended *nunc pro tunc;* and there is no reason or force in the objection that the amendment was made after writ of error brought, so long as the party was present and heard on the

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motion, and any abuse in the exercise of the power may be corrected at the hearing on the writ of error (Freem. Judgm. § 72; *Fay v. Wenzell*, 8 Cush. 317; *Balch v. Shaw*, 7 Cush. 284); and this rule applies as well to criminal as civil cases. "The court may order *nunc pro tunc* entries, as they are called, made to supply some omission in the entry of what was done at the preceding term; yet this is a power the extent of which is limited and not easily defined. In general, mere clerical errors may be amended in this way." 1 Bish. Crim. Proc. (2d ed.), sec. 1160; *State v. Clark*, 18 Mo. 432; *West v. State*, 22 N. J. Law, 212; *Bilansky v. State*, 3 Minn. 427. In the case last cited, the plaintiff in error had been convicted of the crime of murder; and, after the case had been carried to the supreme court, the record of the proceedings on the trial was amended so as to show affirmatively that each juror was sworn, and that they were put in charge of the officer to keep them as prescribed by law, and that they were polled on coming in with their verdict, at the request of the defendant,—matters which had been omitted from the record,—and the right to make such amendments to supply defects in or omissions from the record was sustained. In the recent case of *In re Wight*, 134 U. S. 136, 143, the doctrine of this case was affirmed, and the power of the court to make such amendments in a criminal case after the term was discussed and sustained.

It is a matter of regret that many of the records in criminal as well as civil cases coming to this court are defective in important particulars, and made up in an irregular, imperfect, or confusing manner. The circuit judges ought to exercise such supervision over the method of making up, keeping, and certifying records as will protect the rights of the public and parties litigant; and to this end they may, if necessary, remove negligent or incompetent clerks. The amendments to the record made by the circuit court in this

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case, and returned to this court, were rightfully and properly made, and the objections relied on cannot prevail.

2. A careful examination of the evidence satisfies us that the plaintiff in error was improperly convicted of murder in the third degree; that there was no evidence to warrant the instructions given to the jury on that subject, leaving them to find him guilty of that offense. Murder in the third degree consists in "the killing of a human being, without any design to effect death, by a person *engaged in the commission* of any felony." R. S. sec. 4345. Any offense for which the offender, on conviction, shall be liable by law to be punished by imprisonment in the state prison, is a felony, within the meaning of this statute. Sec. 4637. There is no claim that the plaintiff in error, on the occasion in question, was guilty of any felony, within the meaning of sec. 4637, unless it was under sec. 4377, which declares that "any person who shall assault another with intent to do great bodily harm, shall be punished by imprisonment in the state prison not more than three years nor less than one year, or in the county jail not more than one year, or by fine," etc.; and for assaulting Robert Risto, "with intent to do great bodily harm." The question, in brief, is, Was *August Hoffman*, the plaintiff in error, at the time of the killing of Herzog, engaged in the commission of an assault on Robert Risto with the intent to do great bodily harm? If the assault on Robert Risto was at an end before the killing of Herzog occurred, so that the latter act had no legal connection with or relation to the assault on Robert Risto, and it can be said that the killing of Herzog did not occur during such assault, the plaintiff in error ought not to have been convicted of murder in the third degree. The evidence is clear and beyond question that the assault on Risto had terminated and was at an end before the plaintiff in error struck Herzog. He had wholly desisted from his demonstrations against Risto, and had turned

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around to face Herzog, who had taken the chair from him, and it had been put on the floor. He made motions manifesting an intention to fight with or defend himself against Herzog, and, at a time when it does not appear that any one was threatening or assaulting Risto, Herzog sprang forward, struck the plaintiff in error a heavy blow about his eye, and felled him to the floor upon his back. The plaintiff in error got up, and he and Herzog engaged in a struggle, when they fell on the floor, during which the wound was given which caused Herzog's death. It would seem from Risto's evidence that he was not in the room at the time the killing occurred, and no witness makes any clear mention of his presence or of anything that was done to or against him after Herzog took the chair away from the plaintiff in error. It is not sufficient that the plaintiff in error killed Herzog; but, in order to render him guilty of murder in the third degree, at the time the homicide was committed it was requisite that he should have been engaged in an assault on Robert Risto with intent to do great bodily harm. This might occur in various ways, as if, during the assault, Herzog had come between the parties, and received a mortal blow or wound intended for or aimed at Risto, or he had been intentionally stricken down by a mortal blow or wound in an attempt to reach Risto. *State v. Hammond*, 35 Wis. 315, 318; *Terrill v. State*, 74 Wis. 278, 284.

The finding of the jury is, in legal effect, that the plaintiff in error killed Herzog without any design to effect his death. In murder in the third degree the malice and felonious intent necessary to make it such is derived from the felony by the commission, or in the commission, of which the killing happens. *Pliemling v. State*, 46 Wis. 516, 519, in which the subject is fully discussed by the present chief justice. So in *State v. Smith*, 32 Me. 369, the court says: "The malice is implied when the killing is committed by a

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person when in the perpetration of a crime punishable in the state prison; . . . and if, *in the perpetration of that offense*, a killing occurs, the malice making the killing murder may be implied." In *Pliemling v. State*, 46 Wis. 516, the conclusion was reached, that, "in order to make a killing 'without a design or intention' murder in the third degree, the felony committed or attempted, from which the implied malice necessary to murder must be derived, must at least have some intimate and close relation with the killing, and must not be separate, distinct, and independent from it." It is not enough that the killing occurred soon or presently after the felony attempted or committed. There must be such a legal relation between the two that it can be said that the killing occurred by reason and as a part of the felony, or, as in this case, that the killing occurred before the assault on Robert Risto was at an end; so that the assault had a legal relation to the killing, and was concurrent with, in part at least, and a part of, it, in an actual and material sense. The assault upon Robert Risto and the killing of Herzog by the plaintiff in error, according to the evidence, bore no such actual or legal relation; and the court erred in submitting to the jury whether he was guilty of murder in the third degree. For this reason the conviction must be reversed.

By the Court.— The judgment of the court below is reversed, and the cause is remanded for a new trial. The warden of the state prison at Waupun will deliver the prisoner, *August Hoffman*, to the sheriff of Marathon county, to be held by him in custody until he is discharged therefrom according to law.

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THE STATE VS. JUNEAU.

May 9 — May 25, 1894.

Competency of child to testify: Sufficiency of evidence: "Open lewdness."

1. Whether a child above the age of four years is competent to testify is to be determined by examination of the child in court, and the question is addressed to the discretion of the trial court.
2. A conviction of the offense of open and gross lewdness may be sustained upon the testimony (with some corroboration) of a child five years and five months old, who was less than five years old when the offense was committed.
3. An act of gross lewdness is "open," within the meaning of sec. 4579, R. S., though committed in a private place and when no one was present but the defendant and the person upon whom the act is alleged to have been committed, and although such person was a child of tender years.

REPORTED from the Circuit Court for *Langlade* County.

The report is made under sec. 4721, R. S., and is as follows: "At the September term, 1893, of the above court, the above-named defendant, *Andrew Juneau*, was convicted of 'open and gross lewdness and lascivious behavior,' under the provisions of sec. 4579, R. S. The offense was alleged to have been committed on the 14th day of December, 1892, in a building occupied by the defendant; no one being present at the time except the defendant and a little girl named Clara Brown, who was at that time about four years and nine months old, and who was about five years and five months old at the time of the trial. The alleged offense consisted of the indecent exposure of defendant's person to said child, and the commission of an indecent assault upon her. The defendant was convicted upon the testimony of said child, corroborated by that of her mother and a physician who was called to examine her a short time after the alleged assault. Certain questions of law

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having arisen during the trial, which, in the opinion of the presiding judge, are so important and doubtful as to require the decision of the supreme court, now, therefore, I, John Goodland, judge of the tenth judicial circuit, do hereby certify to the supreme court of the state of Wisconsin (said defendant consenting thereto) the said questions for decision, as follows: First question: Did the circuit court err in permitting the child, Clara Brown, to testify in this case? Second question: Can a conviction for a criminal offense be sustained upon the testimony (with some corroboration) of a child who was under the age of five years at the time the offense is alleged to have been committed? Third question: Is an act of gross lewdness 'open,' within the meaning of sec. 4579, R. S., when committed in a private place, and when no one is present except the defendant and the person upon whom the act is alleged to have been committed? A copy of the testimony taken and the proceedings had upon said trial is hereunto annexed."

For the plaintiff the cause was submitted on the brief of the *Attorney General*, and *J. M. Clancey*, Assistant Attorney General. They argued, among other things, that the testimony of a child is admissible if the court is satisfied that he is sufficiently conscious of the duty to speak the truth to permit the reception of his evidence. *Washburn v. People*, 10 Mich. 372; 1 Greenl. Ev. sec. 367; *McGuire v. People*, 44 Mich. 286; *Draper v. Draper*, 68 Ill. 17; *Flanagin v. State*, 25 Ark. 92; *Brown v. State*, 2 Tex. App. 122; *State v. Richie*, 26 Am. Rep. 100; *Givins v. Comm.* 29 Grat. 835; *Ake v. State*, 6 Tex. App. 398; *McGuff v. State*, 88 Ala. 150; 1 East, P. C. 441, 443; 4 Bl. Comm. 214; 1 Leach, Cr. Cas. 200; *Blackwell v. State*, 11 Ind. 196; *Vincent v. State*, 3 Heisk. 120; *Comm. v. Carey*, 2 Brews. (Pa.), 404; *Davidson v. State*, 39 Tex. 129; *State v. Whittier*, 21 Me. 341; 1 Roscoe, Cr. Ev. (8th ed.), *115.

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For the defendant the cause was submitted on the brief of *S. S. Hamilton.* To the point that secret and private illicit intercourse or lewdness is not "open" within the statute, he cited 13 Am. & Eng. Ency. of Law, 278, par. iv; id. 279, note 1; id. 277, note 6; *Comm. v. Catlin*, 1 Mass. 8; *Comm. v. Wardell*, 128 id. 52.

NEWMAN, J. It seems to be the settled law that, after four years of age, a child is not incompetent to testify as a witness by reason of any rule of law which excludes him. Whether a child above that age is competent to testify depends upon his intelligence, which is to be determined by the trial court by examination of the child in court. The question is addressed to the discretion of the trial court. Its determination on such examination is final, except in a clear case of the abuse of its discretion. "It may be regarded as well settled that whenever there is intelligence enough to observe and to narrate, there a child (a due sense of the obligation of an oath being shown) can be admitted to testify." 1 Whart. Ev. (3d ed.), § 398. "Age, at least after four years are past, does not touch competency; and the question is one of intelligence, which, whenever a doubt arises, the court will determine to its own satisfaction by examining the infant on his knowledge of the obligation of an oath and the religious and secular penalties for perjury." Id. § 399. "It will require a strong case to sustain a reversal of the ruling of the court examining such a witness." Id. § 400. See cases cited in the brief of the attorney general; also, *State v. Morea*, 2 Ala. 275; *Wade v. State*, 50 Ala. 164; *Blackwell v. State*, 11 Ind. 196; *State v. Denis*, 19 La. Ann. 119; *People v. Bernal*, 10 Cal. 66; *State v. Whittier*, 21 Me. 341; *State v. Le Blanc*, 3 Brev. (S. C.), 339; *State v. Jackson*, 9 Oreg. 457. Whether the trial court determined rightly the questions of the competency of the witness is not presented here. That is a question of fact.

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Only questions of law are to be reported, under the statute, or considered by this court. *State v. Gross*, 62 Wis. 41; *State v. Cornhauser*, 74 Wis. 42. The court, being satisfied of the competency of the witness, did not err in permitting her to testify in the case.

2. Ordinarily, the testimony of one competent witness is sufficient to sustain a conviction. There are crimes for which it is not competent to convict upon the uncorroborated testimony of one witness. These are exceptions from the general rule, created either by statute or some established rule of the common law. Except in these excepted cases the testimony of one witness answers at law. Even the testimony of an accomplice is sufficient (*Black v. State*, 59 Wis. 471), and that even in a capital case (*U. S. v. Neverson*, 1 Mackey, 152; *U. S. v. Bicksler*, id. 341). The weight of the evidence is for the jury. If they are satisfied by it beyond a reasonable doubt, it is legally sufficient. Even in cases of rape, there is no inflexible rule which requires corroboration of the complainant's testimony. Such corroboration is expected, and its absence seriously impairs the case of the prosecution. But the law itself is satisfied with such corroboration as is practically procurable; else, many crimes could be perpetrated with impunity. 1 Whart. Cr. Law (9th ed.), sec. 565. It is, to a great extent, in the discretion of the trial court, in most cases, whether corroboration shall be required, and how much. *Ingalls v. State*, 48 Wis. 649; *Black v. State*, 59 Wis. 471. Under the direction of the court, an intelligent jury are not likely to err in giving undue credit and force to the testimony. If that should happen, it is always within the power of the court to correct such a mistake by a new trial. It appears by the report that there was some corroboration of the principal witness. Whether the whole evidence supports the conviction cannot be answered here. *State v. Gross*, 62 Wis. 41. The court being satisfied by its

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examination that the witness was competent to testify, and that practically all the corroborative testimony which was practically procurable had been produced, and being satisfied of the truth of the verdict, the conviction is lawful and should be sustained.

3. The act alleged against the defendant is an act of "open and gross lewdness," within the meaning of the statute. The statute punishes not public, but open, lewdness. The phrase "open and gross lewdness" is not equivalent to the phrase "gross lewdness in an open place." The word "open" has no reference to place at all, nor to number of people. It is used simply to define a quality of the act of lewdness. It is "open lewdness" as opposed to "secret" lewdness. It defines the same act, regardless whether it is committed in presence of one or of many. The offense may be committed by the intentional act of exposing one's person indecently in the presence of one person, to whom it is offensive, as well as in the presence of many persons. It could not change the quality of the act that it was committed in the presence of a child of tender years, too innocent to be offended by it. The benignity of the law would neither presume nor permit the consent of such a child to such an act. *Fowler v. State*, 5 Day, 81; *Grisham v. State*, 2 Yerg. 589; *State v. Millard*, 18 Vt. 574; *Comm. v. Wardell*, 128 Mass. 52.

By the Court.—The first question is answered in the negative. The second and third questions are answered in the affirmative. It will be so certified to the circuit court.

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SHEPHARD and others, Plaintiffs in error, vs. THE STATE, Defendant in error.

May 9 — May 25, 1894.

Criminal law: Evidence: Confession under duress.

1. An error in admitting a confession, incompetent because made under duress, is not cured by the subsequent exclusion thereof. The admissibility of the confession should have been determined before it was admitted.
2. The confession having been admitted and afterwards excluded as incompetent, it was error to allow the defendant, who had testified on his own behalf, to be asked on cross-examination whether he made such confession, and, upon his denial, to admit evidence that he did make it, and of the particulars thereof, for the purpose of contradicting him.

ERROR to the Circuit Court for *Ashland* County.

The facts are stated in the opinion.

The cause was submitted for the plaintiffs in error on the brief of *A. R. Mead*, attorney, and *Sanborn, Dufur & Anderson*, of counsel, and for the defendant in error on that of the *Attorney General* and *J. M. Clancey*, Assistant Attorney General.

ORTON, C. J. The defendants were informed against, tried, convicted, and sentenced to imprisonment in the state prison for the crime of robbery and stealing from the person of one Joseph Preedon the sum of $20. As we understand the record, there are but two assignments of error: (1) The court admitted in evidence the confession of the defendant *Joseph Shephard* to the police officers while he was in custody in the common jail, and the evidence had its effect on the jury, and then the court excluded it as being a confession made under duress and extorted by threats, promises, and by falsehood. The court should have determined whether the confession was admissible

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before it was given in evidence. (2) The court, after having excluded the confession as incompetent, allowed the district attorney to cross-examine the defendant *Shephard*, who had offered himself as a witness, as to whether he made such confession, and, he having denied it, allowed evidence on behalf of the state to contradict the testimony of *Shephard* by evidence that he did make such confession, and the particulars thereof.

1. We are of the opinion that said first error is well assigned. The testimony was before the court as to the manner in which the confession had been obtained, and the court should have decided it as a preliminary question before admitting the whole confession in evidence. Every word of the confession was fastened on the minds of the jury, and had made its impression there against the accused. Its subsequent rejection by the court would not erase or remove that impression. It had produced its lasting effect upon the jury, and must have affected their verdict. The remarks of the learned judge in ruling upon the objections to the evidence were well calculated to deepen the impression already made by the evidence upon the minds of the jury. We cannot but think that this was a material error and prejudicial to the accused.

2. The method here adopted to get the confession of *Joseph Shephard* in evidence, after it had been excluded by the court as being incompetent and inadmissible by reason of its having been extorted by promises of immunity and threats of injury and by falsehood, was certainly very ingenious and plausible. It would seem as if it was made to fit the case of *Comm. v. Tolliver*, 119 Mass. 313. It was this case that induced the court to admit the evidence. That was also a case of robbery, and by more than one defendant, and one of them made a confession to the officers in the jail. The testimony of the officer was first taken as to the manner in which the confession was obtained (and

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the manner was about the same as in this case), and the court ruled that the confession was incompetent and should not be introduced in evidence. About the only difference from this case is that the jury did not hear the confession. It is to be regretted that the court did not follow that case in this respect. The case is not very fully reported, but the principle established seems to be that although the testimony of the confession was incompetent, yet, where the accused offered himself as a witness, he became such, as any other witness, and might be asked whether he made the confession, and, if he denied it, the confession itself might be proved to contradict him by way of impeachment. No other reason is given. The case is unsatisfactory, and we cannot follow it. The confession was rejected because it was extorted. It was unfair to the accused, and should not be proved against him, and is condemned by the court and ruled out. When the defendant was asked if he made that confession, and denied it, the same witnesses who extorted the confession, and whose testimony was disallowed on that account, are allowed to testify to the confession, however wickedly or wrongly it was obtained, on the exceedingly narrow theory that it is not admitted *as a confession*, but merely to *contradict* the witness. The confession is allowed to go to the jury, and have its effect in convicting the defendants, and override the ruling of the court that it was inadmissible as evidence against him, and for such a petty reason. The confession is just as objectionable as evidence, and as incompetent and hurtful, when offered in one way as in another. If no other evidence on the ground of contradicting the defendant as a witness could be found, he had better have gone uncontradicted than that his legal rights as a prisoner should be so violated and his conviction obtained by such unlawful testimony. The object is to get the confession in evidence. It cannot be done *directly*, but it can be done *indirectly*. It cannot

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be used to convict, but it can be used to *contradict*, the defendant, and in that way it is used to convict him all the same. We cannot adopt such a principle or practice in the administration of criminal law. It is unreasonable as well as unjust. This evidence was inadmissible on the familiar ground that a witness cannot be cross-examined and contradicted in respect to matters not admissible in evidence as part of the case. Whart. Cr. Ev. sec. 484. That confession first went to the jury and produced its effect as evidence, before it was excluded by the court, and finally goes to the jury as competent evidence by way of contradicting the defendant. It seemed impossible to keep it out, however objectionable or incompetent it was as evidence against the accused. That it was incompetent is not an open question in the case. The court so decided in favor of the defendants.

For the above errors the judgment must be reversed and a new trial ordered.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial. The warden of the state prison at Waupun is hereby ordered to deliver the defendants into the custody of the sheriff of the county of Ashland, to be held by him until they are discharged from his custody according to law.

THE CITY NATIONAL BANK OF DAYTON, OHIO, Respondent, vs. KUSWORM, Appellant.

May 1 — June 2, 1894.

Promissory notes: Duress: Avoidance: Restoration of consideration.

1. A wife may avoid her note made under duress of threats of criminal prosecution of her husband.
2. Under duress of threats of criminal prosecution of her husband on the charge of forging notes deposited as collateral security for his

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own notes to a bank, a wife gave her note to the bank for the amount of her husband's notes. The cashier of the bank thereupon delivered the husband's notes and the collaterals to a friend of the wife, who, at once, in the presence of the cashier, handed them to her, telling her to give them to her husband, and she afterwards did so. In an action by the bank upon the wife's note, it is *held* that she may avoid it on the ground of duress without restoring her husband's notes or the collaterals to the bank. WINSLOW and PINNEY, JJ., dissent.

APPEAL from the Circuit Court for *Dane* County.

The plaintiff is a banking corporation, organized and existing under and by virtue of the laws of the United States, and located at Dayton, Ohio, and brings this action to recover the amount due upon a promissory note, of which the following is a copy, to wit:

"$4,900. Chicago, Nov. 2, 1892.

"On demand, for value received, I promise to pay to the order of *City National Bank* the sum of $4,900, at Chicago, with interest at the rate of six per cent. per annum after date, having deposited with said *City National Bank*, as collateral security, my equity of six thousand dollars ($6,000), in a note of Frank M. Stringfield and Sarah Agnes Stringfield for $12,000, dated October 7, 1892, due sixty days after date, payable to the order of themselves and indorsed, together with the security of a trust deed to Abram L. Stone, recorded in book 8082 of records of Cook county, on page 146, which I hereby give the said *City National Bank*, its agents or assignee, authority to sell, or any part thereof, on the maturity of this note or at any time thereafter, or before in the event of said security depreciating in value in the opinion of said *City National Bank*, at public or private sale, at the discretion of said *City National Bank* or its assignee, without advertising the same or demanding payment or giving me any notice, and to apply so much of the proceeds thereof to the payment of this note as may be necessary to pay the same, with all

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the interest due thereon, and also to the payment of all expenses attending the sale of the said note and trust deed, including attorney's fees; and in case the proceeds of the sale of the said note and trust deed shall not cover the principal, interest, and expenses, I promise to pay the deficiency forthwith after such sale. MOLLIE KUSWORM."

The plaintiff prayed judgment accordingly.

The defendant answered the complaint, and in effect alleged: (1) That the note was obtained from her without any valuable consideration therefor, through the fraud of the plaintiff's agent; (2) that it was given to compound a felony; (3) that it was given under duress of threats to prosecute the defendant's husband, then very sick, and who died soon thereafter, for the crime of forgery, and in consideration of the suppression of documentary proof of his guilt.

The court having ruled that under the pleadings the defendant was entitled to the opening and closing of the case, the defendant took the burden of the defense. At the close of the testimony on the part of the defendant, the court was asked to direct a verdict in favor of the plaintiff for the amount of the note and interest. Before the decision of that motion, the defendant's counsel asked leave to amend the answer by setting up the disposition of the notes surrendered by Gebhart, her ignorance as to what was done with them by her husband, and her willingness to produce and restore the same to the plaintiff so far as she was able so to do; and further alleging that the defendant was a nonresident of the state of Wisconsin,— which amendment was disallowed by the court, except as to the allegation of the defendant's nonresidence. In determining the motion for an order directing a verdict in favor of the plaintiff, the court said: "As far as the question as to the power of making this contract on the part of the defendant, *Mrs. Kusworm*, is concerned, I am of the opinion, as I ruled once

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before this term, that that power exists, even under the laws of the state of Wisconsin; and I must say that, as to that point, I think that the contract is a binding one upon the defendant. As to the defense interposed,—that the transaction by which this note was given was compounding a felony,—I think the proof clearly shows that no such compounding was then made by the parties; that is, that the elements which constitute the compounding of a felony were absent in the dealings. As to the other point of the defense,—that of duress,—the proof is undisputed but what matters occurred there tending to show that there was some duress or compulsion practiced on the part of the officer of the bank towards this woman. But, to entitle the defendant to recover on that, I think she must, as a matter of law, offer full restitution to the plaintiff, and, not having done so, I must direct a verdict for the plaintiff. The defendant admits the making of the note and the amount. So a verdict for the plaintiff is directed for the principal sum, with interest thereon as specified in the note;" to wit, for the sum of $5,157.25.

From the judgment entered in accordance with the verdict so directed the defendant appeals.

For the appellant there was a brief by *Bashford, O'Connor, Polleys & Aylward* and *Moran, Kraus & Mayer*, and oral argument by *R. M. Bashford.* They argued, among other things, that the note in suit was obtained through duress of the appellant and could not be enforced. *Bryant v. Peck & W. Co.* 154 Mass. 460; *Magoon v. Reber*, 76 Wis. 392; *Harris v. Carmody*, 131 Mass. 51; *Eadie v. Slimmon*, 26 N. Y. 9; *Lefebvre v. Dutruit*, 51 Wis. 334; *Schultz v. Catlin*, 78 id. 611; *Watkins v. Brant*, 46 id. 419, 425; *Bogie v. Bogie*, 37 id. 373; *McCormick H. M. Co. v. Hamilton*, 73 id. 486; *Kuelkamp v. Hidding*, 31 id. 503, 510; *Smith v. Smith*, 60 id. 329; *Cribbs v. Sowle*, 87 Mich. 340; *Morrill v. Nightingale*, 93 Cal. 452; *Morrison v. Faulkner*, 80 Tex.

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128. The note in suit was given to prevent a criminal prosecution of a felony, and in consideration of the suppression of the documentary proofs of the crime, and it cannot therefore be enforced by the principal party to the transaction. *Haynes v. Rudd*, 83 N. Y. 251; *Haynes v. Rudd*, 102 id. 373; *Bryant v. Peck & W. Co.* 154 Mass. 460; *Schultz v. Culbertson*, 46 Wis. 313; *Swartzer v. Gillett*, 2 Pin. 238; *Fay v. Oatley*, 6 Wis. 42; *Ætna Ins. Co. v. Harvey*, 11 id. 394; *Melchoir v. McCarty*, 31 id. 252; *Barker v. Barker*, 14 id. 131; *Allard v. Lamirande*, 29 id. 502; *Schultz v. Catlin*, 78 id. 611; *Wight v. Rindskopf*, 43 id. 344; *Eadie v. Slimmon*, 26 N. Y. 9; *Harris v. Carmody*, 131 Mass. 51; *Taylor v. Jaques*, 106 id. 295; *Hamilton v. Lockhart*, 158 Pa. St. 452; *Roll v. Raguet*, 4 Ohio, 400; *Raguet v. Roll*, 7 id. 76. The failure of the appellant to offer restitution does not, under the circumstances, amount to a ratification as a matter of law. *Brown v. Peck*, 2 Wis. 261; *Heckman v. Swartz*, 50 id. 267; *Magoon v. Reber*, 76 id. 392; *Meech v. Lee*, 82 Mich. 274; *Harris v. Carmody*, 131 Mass. 51; *Morse v. Woodworth*, 155 id. 233; *Eadie v. Slimmon*, 26 N. Y. 9; *Barry v. Equitable Life Ass. Soc.* 59 id. 587; *Adams v. Irving Nat. Bank*, 116 id. 606; *Dimmitt v. Robbins*, 74 Tex. 441; *First Nat. Bank v. Bryan*, 62 Iowa, 42; *Baldwin v. Hutchison*, 35 N. E. Rep. 711; *Reynolds v. Copeland*, 71 id. 422.

For the respondent there was a brief by *Charles Noble Gregory*, attorney, and *L. P. Conover* and *S. S. Gregory*, of counsel, and a supplemental brief by *S. S. Gregory*, of counsel; and the cause was argued orally by *Charles Noble Gregory*. They contended, *inter alia*, that failure to return the consideration of a contract bars the defense of fraud, mistake, or *duress*. Cooley, Torts, 506; 2 Parsons, Cont. *679-80, and note A; *Grymes v. Sanders*, 93 U. S. 55; *Schiffer v. Dietz*, 83 N. Y. 300; *Parsons v. McKinley*, 57 N. W. Rep. 1134; *Blake v. Nelson*, 29 La. Ann. 245; Bryant's Justice, § 986 and cases cited; *Grant v. Law*, 29

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Wis. 99; *Williams v. Ketchum*, 21 id. 432; *Potter v. Taggart*, 54 id. 395; *Van Trott v. Wiese*, 36 id. 439; *O'Dell v. Burnham*, 61 id. 562; *Reynolds v. Copeman*, 71 Ind. 422; *Baldwin v. Hutchison*, 35 N. E. Rep. 711; *Higham v. Harris*, 108 Ind. 246; *Burnham v. Mitchell*, 34 Wis. 117. The evidence makes no case of duress in law. *Lefebvre v. Dutruit*, 51 Wis. 326; *Metropolitan Life Ins. Co. v. Meeker*, 85 N. Y. 614; *Horton v. Bloedorn*, 37 Neb. 666; *Youngs v. Simm*, 41 Ill. App. 28; *Ford v. Cratty*, 52 Ill. 313; *Heaps v. Dunham*, 95 id. 583; *Knapp v. Hyde*, 60 Barb. 80; *Seymour v. Prescott*, 69 Me. 376; *Compton v. Bunker Hill Bank*, 96 Ill. 301; *Buchanan v. Sahlein*, 9 Mo. App. 552; *Higgins v. Bram*, 78 Me. 473; *Town Council v. Burnett*, 34 Ala. 400; *Thorn v. Pinkham*, 84 Me. 101; *Hilborn v. Bucknam*, 78 id. 482; *Harmon v. Harmon*, 61 id. 227; *Mundy v. Whittemore*, 15 Neb. 647; *Cass Co. Bank v. Brickner*, 34 id. 516; *Weber v. Barrett*, 125 N. Y. 18, 25; *Keckley v. Union Bank*, 79 Va. 458; *Schwartz v. Schwartz*, 29 Ill. App. 516; *Feller v. Green*, 26 Mich. 70; *Taylor v. Cottrell*, 16 Ill. 93. In order to make the defense of compounding a felony available, the probable commission of a felony, or the commencement of a criminal prosecution therefor, must be both pleaded and proved, neither of which was done in this case. *Eberstein v. Willets*, 134 Ill. 106; 1 Wharton, Contracts, sec. 483; *Swope v. Jefferson F. Ins. Co.* 93 Pa. St. 253; *Catlin v. Henton*, 9 Wis. 476; *Steuben Co. Bank v. Mathewson*, 5 Hill, 249; *Schultz v. Catlin*, 78 Wis. 611; *Deere & Co. v. Wolff*, 65 Iowa, 32; *Cheltenham Fire-Brick Co. v. Cook*, 44 Mo. 29; *Wallace v. Hardacre*, 1 Campb. 45.

CASSODAY, J. The execution of the note in suit having been admitted, the plaintiff offered no evidence. On the part of the defendant the evidence, in effect, tends to prove: That on and for some time prior to November 1, 1892, the plaintiff held two promissory notes which it had received

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from the defendant's husband, Moses Kusworm, each of which was signed, "M. Kusworm," one being for $4,100 and the other being for $800, making an aggregate indebtedness of $4,900, for money loaned by the plaintiff to him; and that the same were secured by four, five, or six other notes, purporting to be executed by other parties, aggregating in amount seven or eight thousand dollars, as collateral security for the payment of such indebtedness of $4,900. That in the forenoon of November 1, 1892, one Gebhart, agent for the plaintiff, having both of said notes, and also said notes so held as collateral, in his possession, called on the defendant and requested to see her husband. That she told him her husband was very sick. That he said it made no matter, that he must see him, that her husband had borrowed $4,900 from the plaintiff bank, and that he had come there to either get the money or security. That she then obtained permission from the nurse for Gebhart to see Mr. Kusworm. That Gebhart then had an interview with Mr. Kusworm in his room alone, neither she nor the nurse being present; that, finally, Mr. Kusworm called the defendant, and she went into his room. That Mr. Kusworm then told her to put on her coat and hat, and go with Mr. Gebhart to Mr. Stone's house, and secure Gebhart for $4,900 on the mortgage of $12,000 in which the defendant had an equity of $6,000, the other $6,000 of which belonged to Stone, a cousin of Mr. Kusworm. That Gebhart then told her that he had notes with him for $4,900 which her husband had forged; that he would have the Pinkerton detectives take her husband back to Ohio and put him in the hospital until he was able to go to jail, and would then put him in prison. That she protested, on account of her husband's dying condition, and that it would rob her home and her two little children of a father. That she almost fainted. That Gebhart then said, "No matter;" that he had come as agent of the bank, and must fulfill his

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duty; that he must either take Mr. Kusworm back to Ohio or she must take up these notes which Mr. Kusworm had forged. That thereupon she and Gebhart took a cab and drove to the office of the plaintiff's attorney, and that the attorney then got into the cab and they all drove to the house of Stone. That Stone was not at home, and so she left a note, requesting him to call at the attorney's office at three o'clock that afternoon. That she then returned to her home and found her husband under the effects of a sleeping powder, but she was cautioned by the nurse not to speak to him for fear that he might die from the effects. That the defendant was in a very delicate condition and weak at the time, having been in the family way for more than three months, but that she managed to get back to the attorney's office at the time appointed. That she found Gebhart and his attorney there, but Stone did not arrive until some minutes afterwards. That Gebhart at once repeated his threats. That when Stone came she introduced Gebhart to him as the man who claimed that her husband had forged notes to the amount of $4,900, and that he had come there to secure the debt Mr. Kusworm was liable for, or take him back to Ohio. That she said that, in order to prevent her husband from being taken back to Ohio and prosecuted, she was willing to turn over her equity in the mortgage mentioned to secure the plaintiff. Stone stepped out and got the mortgage, and returned with it in a few minutes, and thereupon Gebhart and his attorney took the matter under advisement, with an agreement that she and Stone, respectively, would meet them at the same office the next morning at 11 o'clock. That she was compelled to wait in the rain for a long time for the cable cars. That she got home about 8 o'clock in the evening. That she found her children waiting, and her husband scarcely able to open his eyes. That she retired without eating anything, and spent a sleepless night. That, upon returning to the

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attorney's office the next morning, she found Gebhart and Stone there. That Gebhart refused to accept the security she had offered, for the reason that Stone's part of the mortgage was prior to hers. That Gebhart finally offered to accept the security if Stone would agree in writing to prorate with the plaintiff in the mortgage. That Stone at first refused. That Gebhart then repeated his threats, and the defendant cried and begged of Stone to consent and thus save her husband, and that he would lose nothing by it; and thereupon Stone consented and signed the agreement, and the defendant signed the note in suit. That Gebhart then handed an envelope to Stone, supposed to contain the note of $800 and the note of $4,100, each signed "M. Kusworm," and also the notes to the aggregate amount of seven or eight thousand dollars held by the plaintiff as collateral thereto, and that Stone thereupon, and in the presence of Gebhart, handed the envelope with the notes therein to the defendant with direction to give them to her husband. That the defendant took the envelope with the notes therein from Stone, and delivered them to her husband as so directed. That she did not examine the notes in the office, and never saw them thereafter, and had no knowledge as to where they were. That she had no conversation with Stone, and did not see him on either of the days mentioned except in the presence of Gebhart and his attorney. That Stone did not see Mr. Kusworm on either of those days, and had not seen him for several weeks before, and did not see him for several weeks afterwards. That the only connection Stone had with the matter was by reason of his owning a part of the mortgage as mentioned. That the defendant did not know what her husband had done with the notes. That he died December 5, 1892, and she was the executrix of his will. That she had looked over her husband's papers, but had never found the notes.

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The defendant positively swears that she never signed the $800 note nor the $4,100 note, and that she never authorized her husband to sign either of those notes or any notes; but, on her cross-examination, a power of attorney was presented, bearing date September 18, 1891, and which she admits to have been signed by her, authorizing her husband to sign and indorse notes; and it is contended on the part of the plaintiff that Mr. Kusworm signed the $800 note and the $4,100 note, respectively, "M. Kusworm," meaning thereby the defendant, *Mollie Kusworm*, instead of Moses Kusworm. Whatever may be the fact in that regard, yet the evidence in the record is very strongly against any such contentions. There is no evidence that either of those notes was signed by an agent instead of the principal. There is no evidence that Gebhart at any time during any of the several interviews mentioned claimed or pretended that the defendant was the maker of either of those notes, nor that the defendant was, at any time before the making of the note in suit, in any way indebted to the plaintiff, nor that he was there seeking security for any indebtedness of the defendant. Since the verdict was directed for the plaintiff, we must, for the purposes of this appeal, assume that the $800 note and the $4,100 note were each signed "M. Kusworm" by Moses Kusworm, as and for his own signature, and not as and for the signature of his wife.

There is no evidence that Mr. Kusworm actually forged any note, but simply that Gebhart charged him with having forged the notes, as mentioned. It is true that the defendant testified to the effect that Gebhart claimed that he had forged notes in the amount of $4,900; but, from the whole evidence, it is very apparent that the real charge made by Gebhart was to the effect that Mr. Kusworm had forged sundry names to the four, five, or six notes, aggregating seven or eight thousand dollars, which the plaintiff held as collateral security for his indebtedness to the plaint-

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iff bank, as mentioned. Upon such evidence the trial court directed a verdict in favor of the plaintiff and against the defendant. The correctness of such ruling is the only question here for review.

Manifestly the defendant cannot avoid paying the note upon the mere ground that it was given to compound a felony. *Catlin v. Henton*, 9 Wis. 476; *Schultz v. Catlin*, 78 Wis. 611. The only defense available, if any, would seem to be that the defendant was prevailed upon to give the note in suit by duress. As a general rule the defense of duress is not available in an action upon a note given to prevent the criminal prosecution of another person. To this rule there are certain well-established exceptions. Among other exceptions, a wife may avoid her contract, otherwise valid, by reason of a threatened criminal prosecution of her husband, and conversely; and so a father may avoid his contract by reason of a threatened criminal prosecution of his son, and conversely. Thus in *Bayley v. Williams*, 4 Giff. 638, affirmed *Williams v. Bayley*, L. R. 1 H. L. 200, a son forged his father's name, as indorser, upon certain promissory notes, and obtained money thereon from his bankers. The fact of the forgeries having been discovered, which the son did not deny, the bankers, without any direct threat of any prosecution, insisted upon a settlement, to which the father was to be a party. The father consented, and agreed in writing to make an equitable mortgage of his property to secure his son's indebtedness; and it was held that the father was not a free and voluntary agent in the making of such agreement, and hence that the same was invalid. The threatening language to the father in that case was: "If the bills are yours, we are all right. If they are not, we have only one course to pursue; we cannot be parties to compounding a felony. It is a serious matter. It is a case of transportation for life." This is exceedingly mild when compared with the language addressed

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to *Mrs. Kusworm*, and yet, in the opinion of Lord WESTBURY in that case, it is said: "I regard this as a transaction which must necessarily, for purposes of public utility, be stamped with invalidity, because it is one which undoubtedly, in the first place, is a departure from what ought to be the principles of fair dealing between man and man; and it is also one which, if such transactions existed to any considerable extent, would be found productive of great injury and mischief to the community." The same principle has frequently been applied in avoiding contracts made to prevent the criminal prosecution of a parent or child, a husband or a wife, not only in England, but in this country. *Whitmore v. Farley*, 43 Law T. (N. S.), 192, affirmed 45 Law T. (N. S.), 99; *Seear v. Cohen*, id. 589; *McClatchie v. Haslam*, 63 Law T. (N. S.), 376; *Harris v. Carmody*, 131 Mass. 51; *Foley v. Greene*, 14 R. I. 618; *Coffman v. Lookout Bank*, 5 Lea, 232; *First Nat. Bank v. Bryan*, 62 Iowa, 42; *Southern Exp. Co. v. Duffey*, 48 Ga. 358; *Nat. Bank v. Kirk*, 90 Pa. St. 49; *Jordan v. Elliott*, 12 Wkly. Notes Cas. 56; *Sharon v. Gager*, 46 Conn. 189; *McMahon v. Smith*, 47 Conn. 221; *Central Bank v. Copeland*, 18 Md. 305; *Tapley v. Tapley*, 10 Minn. 448; *Meech v. Lee*, 82 Mich. 274; *Eadie v. Slimmon*, 26 N. Y. 9; *Osborn v. Robbins*, 36 N. Y. 365; *Adams v. Irving Nat. Bank*, 116 N. Y. 606; *Schultz v. Culbertson*, 46 Wis. 313; *S. C.* 49 Wis. 122; *Schultz v. Catlin*, 78 Wis. 611. Upon these adjudications and the evidence before us, it is very clear that the note upon which this action is brought was obtained from defendant by duress, and is for that reason void.

It is contended, however, that duress is a species of fraud, and that the defendant cannot rescind the contract for duress without first restoring to the plaintiff the benefits secured by making the contract. It is undoubtedly true that, if a party invokes the aid of equity to set aside a contract by virtue of which he has received a benefit, he will

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be required to restore such benefit as a condition of obtaining such relief. This is upon the familiar principle of estoppel *in pais*. Thus, where a party affirms a contract in part, he is thereby estopped from disaffirming it as to the residue. "It is a doctrine," said NELSON, J., "when properly understood and applied, that concludes the truth in order to prevent fraud and falsehood, and imposes silence on a party only when in conscience and honesty he should not be allowed to speak." *Van Rensselaer v. Kearney*, 11 How. 326. "In short and in popular language," said WILDE, B., "a man is not permitted to charge the consequences of his own fault on others, and complain of that which he has himself brought about." *Swan v. North British Australasian Co.* 7 Hurl. & N. 633. "The doctrine of estoppel *in pais* always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage." *Morgan v. Railroad Co.* 96 U. S. 716.

The question recurs whether, upon the principles stated, the defendant has done anything to estop her from defending against the note in suit. She is not here invoking the aid of a court of equity. She is simply resisting the enforcement of an executory contract on the ground that her signature to the same was procured by duress. As indicated, her defense, as appears from the record, is complete, unless her conduct has been such as to render it inequitable for her to make it. It certainly cannot be said as a matter of law, upon the record before us, that the defendant received any pecuniary benefit or consideration for signing the note in suit, or that she was in any way liable upon or on account of any of the notes surrendered by the plaintiff at the time she signed that note. If the evidence before us is true, then she signed that note for the sole purpose of saving her sick husband from arrest, prosecution,

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and imprisonment. The envelope, containing the notes of $800, and $4,100, each signed "M. Kusworm," and the collaterals thereto, was not delivered by Gebhart to the defendant, but to Stone. Stone thereupon, in the presence of Gebhart, handed the same to the defendant, with the direction that she deliver the same to her husband. In pursuance of such direction, she did deliver the same to her husband. If the evidence in the record is true, then that is all she ever saw of, or had to do with, that envelope or any of the notes thus contained therein. There is no evidence in the record that the defendant exacted, as a condition of her signing the note in suit, that Gebhart should surrender to her any of the notes so contained in that envelope, or that there was any agreement or understanding to that effect. Stone was a cousin of Mr. Kusworm, and apparently his friend; but there is no evidence that he was his agent, or had any authority to act for him, much less that he acted as the agent of the defendant. What he did in the matter was purely voluntary on his part, and as the result of his owning a mortgage with the defendant, as mentioned. Upon the evidence before us, the legal effect of the transaction seems to be no different than it would have been had Mr. Kusworm been present and Gebhart had delivered the envelope with the notes therein directly to him. Suppose such had been the facts, and Mr. Kusworm had immediately, in the presence of Gebhart, thrown the notes contained in the envelope into the fire and burned them up, would the defendant thereby have been estopped from making the defense of duress? In some of the cases cited the wife signed the contract by the duress of her husband; nevertheless, it was held that her defense of duress was available.

There can be no such thing as estoppel *in pais*, except by reason of something said or done by the person estopped; certainly not by the independent act of another person,

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even though such other be her husband. The mere fact that the defendant delivered the package to her husband, as directed in the presence of and acquiesced in by the plaintiff's agent, does not make it inequitable for her to resist the enforcement of an executory contract which she signed only by reason of the plaintiff's duress. It is a well-recognized principle of law that, where a loss must be borne by one of two innocent persons, it shall be borne by him who occasioned it. *Karow v. Continental Ins. Co.* 57 Wis. 61, and cases there cited. If the two parties were equally innocent, yet if the notes contained in the envelope were destroyed by Mr. Kusworm without the privity of his wife, then it was in consequence of Stone's direction, with Gebhart's consent, that they should be delivered to him, and not that the defendant was the mere instrument of making such delivery. But the parties were not equally innocent. On the contrary, as appears from the evidence, the defendant was the victim of very cruel duress on the part of the plaintiff.

There seems to be a dearth of authorities upon the precise question here presented. In some of the numerous cases cited, and especially those in equity, restoration was made or tendered or made a condition of the judgment, while in others the question is not mentioned. In *Jordan v. Elliott*, 12 Wkly. Notes Cas. 56, the victim of the duress was induced to sign a receipt acknowledging the surrender of her son's note and a policy of insurance on his life held by Jordan as collateral thereto, which he assigned to the defendant. Jordan burned the note in the presence of the defendant, but left the policy and the assignment thereof at her house. Of course, there could be no restoration of the note, and it does not appear that the policy was restored; but the supreme court of Pennsylvania affirmed the judgment in favor of the mother. There are numerous cases where duress or fraud has been made available as a

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defense or the ground of recovering back money paid or setting aside contracts executed, without restoration. *Foss v. Hildreth*, 10 Allen, 76; *Manning v. Albee*, 11 Allen, 520; *Kent v. Bornstein*, 12 Allen, 342; *Chandler v. Simmons*, 97 Mass. 508; *Brewster v. Burnett*, 125 Mass. 68; *Morse v. Woodworth*, 155 Mass. 233; *Higham v. Harris*, 108 Ind. 246; *Baldwin v. Hutchison* (Ind. App.), 35 N. E. Rep. 711; *Dimmitt v. Robbins*, 74 Tex. 441; *Brown v. Peck*, 2 Wis. 261. In some of these cases there was a failure to return a release of a claim, or a discharge of a former suit; in some, a failure to return a note and worthless securities; in some, a failure to return counterfeit bills; in some, a failure to restore money paid to a minor and by him wasted; in some, a failure to restore money or property paid or delivered to some person other than the victim of the duress or fraud. The rule seems to be stated fairly well by the late Mr. Justice MITCHELL, of Indiana, in one of the cases cited, as follows: "If the results of a contract or settlement by which a party is sought to be estopped, or which is set up to prevent the assertion of a right, are such as to be *of no benefit to one*, or no detriment to the other, contracting party, that is, if nothing of value was parted with on the one hand *or received on the other*, the contract may be disaffirmed without a formal restoration, on the principle that the law does not require an idle ceremony." *Higham v. Harris*, 108 Ind. 246, 254. Here the defendant received for herself no pecuniary benefit or thing of value. Should it be made to appear upon a trial that the defendant, as executrix of her husband's estate, actually received the notes contained in the package, or otherwise became a party to the destruction or conversion of them, a different question would be presented.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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WINSLOW, J. The importance of the principle involved in this case prompts me to state briefly the reasons why I cannot concur in the conclusions of the majority of the court. The evidence in the case is entirely insufficient to show that the note in suit was given to compound a felony. The only defense which the evidence tends to prove is that the note was given by the defendant under duress of threats of imprisonment of her husband. That an executory contract may be avoided or rescinded which has been made under the influence of such duress as the evidence here tends to prove is quite well established, and I shall spend no time on that question. The avoidance or rescission in such a case stands on the same ground as avoidance or rescission of a contract induced by fraud. Duress is, in fact, a species of fraud. Cooley, Torts (2d ed.), 592; *Reynolds v. Copeland*, 71 Ind. 422; 6 Wait, Act. & Def. p. 663, § 12. Logically and necessarily, the same conditions will be imposed in a case of duress as in a case of the more common kinds of fraud. One of these conditions universally insisted upon is that the defrauded party must return or offer to return the consideration, if any has been received, or its equivalent in case return of the specific consideration be impossible. Citation of authorities on this proposition seems unnecessary, and I content myself with one case in this court, where the rule is well stated, with authorities. *Van Trott v. Wiese*, 36 Wis. 439–448. I know of no exception to this rule, at least as applicable to persons of full age and mental competency. It is true that where a consideration has been received which is worthless or represents nothing of value, its return will not be required, because such return would be a mere idle ceremony. This is not an exception in fact to the rule, but rather a demonstration of the existence of the rule itself, because in such cases failure to return the consideration is always ex-

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cused by the courts on the very ground that there is practically nothing to be returned, thus emphasizing the general rule. With deference, I say that most of the cases relied upon in the majority opinion as justifying the decision in this case are cases where the return of the consideration was excused because it was absolutely worthless.

In *Foss v. Hildreth*, 10 Allen, 76, the party who was seeking to avoid a contract induced by fraud and duress did not return a discharge of a groundless action pending against him, and the court says that such return was not necessary, because "the discharge is not property of any value to the defendant, nor is it of any use to the plaintiff." It appeared in that case, also, that the plaintiff made the voidable contract while intoxicated, and the court remarks that, where a person *non compos* makes a deed and receives a valuable consideration for it, he may avoid it without first returning the consideration. *Manning v. Albee*, 11 Allen, 520, was an action of replevin for a quantity of clothing which Manning had been induced to trade to one French in exchange for French's promissory note, with certain bonds as collateral. The bonds were represented as very valuable, but were in fact worthless. Albee afterwards took possession of the clothing, claiming to have bought it of French, and French disappeared. Manning then ascertained that the bonds were worthless, and brought replevin for the goods against Albee, French not being found. The objection was made that the action could not be maintained without surrender of the note and bonds, but the court holds that to be unnecessary, because it appeared that French could not be found, so that the tender to him was impossible, and the defendant was in no event entitled to them. In *Kent v. Bornstein*, 12 Allen, 342, the return of a counterfeit bill was held unnecessary, because it was entirely worthless. In *Chandler v. Simmons*, 97 Mass. 508, it was

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held unnecessary for a minor, in avoiding his deed made during infancy, to return such part of the consideration as he has wasted or spent *during minority*, but the decision is placed upon the express ground that the consideration had been spent during minority, and the principle is recognized that, if he retained the consideration after becoming of age, he would affirm the contract. In *Brewster v. Burnett*, 125 Mass. 68, the return of counterfeit bonds was not required, because they were *entirely worthless*. In *Morse v. Woodworth*, 155 Mass. 233, the plaintiff was not required to return a release given by defendant, because it *was not property* and after rescission it became of no effect. In *Higham v. Harris*, 108 Ind. 246, it is held that, "if nothing of value was parted with on the one hand or received on the other, the contract may be disaffirmed without a formal restoration, on the principle that the law does not require an idle ceremony." In *Baldwin v. Hutchison*, (Ind. App.) 35 N. E. Rep. 711, the return of an agreement not to prosecute the plaintiff was held unnecessary, because it was "*wholly valueless*." The case of *Dimmitt v. Robbins*, 74 Tex. 441, was a case where Dimmitt was attacked by armed robbers, who demanded a ransom. Robbins, who was present, pretended to give the robbers $2,500 in an envelope for Dimmitt's release, and afterwards sued Dimmitt for the $2,500 as for money loaned. A judgment in favor of Robbins was reversed, because the evidence did not show that the envelope contained $2,500, and further, because the evidence showed that Robbins was a confederate of the robbers, which fact rendered void any contract such as claimed by Robbins. In *Brown v. Peck*, 2 Wis. 261, Brown was excused from returning the $100 which it was claimed he had received, because in fact he never received it. The court says: "There was in fact no valid, legal payment made, nor any received." The money was left in the hands of one Leland, and never came into the possession of Brown.

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The foregoing cases seem to be relied upon in the opinion of the court as justifying in some way the proposition that a contract may be rescinded without return of the consideration. As a matter of fact, it is apparent that not one of them sustains the proposition that, where anything of value has been received under a contract, rescission can be had without return of such value, except, perhaps, in the case of a minor or a person *non compos mentis.* The case of *Jordan v. Elliott*, 12 Wkly. Notes Cas. 56, is still more unfortunate as an authority. It is said in the majority opinion that in that case a policy of insurance, and the assignment thereof, were left at defendant's house, and that it does not appear that the policy was restored. My reading of this case convinces me that the defendant never received anything. It is true she signed a receipt acknowledging that she had received her son's note and policy of life insurance and assignment thereof, but the opinion of the court expressly holds that this receipt was obtained by fraudulent representations as to its contents, and that at the same time the defendant refused "to receive either the note or the policy;" and in another place they are referred to as a "*valuless* consideration, which she (defendant) refused to accept." How this case supports the view of the majority of the court I leave for others to say.

In the present case there is absolutely no question but that *Mrs. Kusworm* received from the bank, in consideration of her note and mortgage, a large amount of negotiable securities. According to the testimony of the witness Stone (which is uncontradicted), Mr. Gebhart handed to him (Stone), when he received *Mrs. Kusworm's* note, two notes of $4,100 and $800 respectively, signed "M. Kusworm," together with four or five collateral notes signed by other persons and aggregating seven or eight thousand dollars, which were collateral to the M. Kusworm notes. All of these notes Mr. Stone immediately passed over to

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Mrs. Kusworm. There was no claim or proof that all of the notes were forged or worthless. The utmost claim made by Gebhart was, according to *Mrs. Kusworm's* own testimony, "I have notes here for $4,900, which your husband has forged." Granting this to be true, there were still notes aggregating seven or eight thousand dollars, which were genuine and valuable securities, which passed into *Mrs. Kusworm's* hands as a consideration for the notes which she now seeks to avoid. The effect of the decision of the court is that she may avoid her own contract without accounting for or returning the consideration thereof, and without showing it to be worthless. I think this is contrary to all the law on the subject. It is said that she received no pecuniary benefit from it, because she turned all the notes over to her husband. Still, the bank parted with it, and, according to the rule laid down by Mr. Justice MITCHELL, quoted with approval in the majority opinion, in order to justify rescission without restoration, there must have been "nothing of value *parted with on the one hand or received on the other.*" But there was value received by *Mrs. Kusworm.* The fact that she turned them over to her husband, according to Stone's advice, surely cuts no figure. Stone was not the agent of the bank in any sense. He was simply the friend of *Mrs. Kusworm.* The sum and substance of the matter is that she voluntarily, on the advice of a friend, turned the notes over to her husband, and thus disabled herself from returning them. Was it ever held that a person, by voluntarily destroying a consideration received or placing it in the hands of a third party, could relieve himself from the necessity of returning it or its value in case of rescission? I have yet to see the case which holds such a doctrine. There seems to me no element of estoppel here as against the bank resulting from the fact that Gebhart heard Stone direct *Mrs. Kusworm* to turn over the notes to her husband, and said nothing. The

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notes had passed entirely beyond the bank's control. Gebhart had received *Mrs. Kusworm's* note and mortgage as full and complete satisfaction for the bank's right and interest in them. She could do as she pleased with them, and the bank could say neither yea nor nay. There was no duty then resting upon Gebhart to speak, and consequently no estoppel from his failure to speak.

The net result seems to be, from the conclusions reached by the court, that the plaintiff loses, without possibility of recovery, the notes of M. Kusworm, and the collaterals which it lawfully held thereto, as well as the note and mortgage of *Mrs. Kusworm.* Against such a result I respectfully protest.

PINNEY, J., concurs in the above opinion by WINSLOW, J.

As to contracts procured by threats of prosecution of a relative, see note to this case in 26 L. R. A. 48.—REP.

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CASES DETERMINED

AT THE

August Term, 1894.

JOHNSTON and another, Respondents, vs. KING and others, Appellants.

April 13 — October 2, 1894.

Replevin: Parties: Sale pending suit.

Under sec. 2801, R. S., an action of replevin may be continued by the original plaintiff although, pending the action, he has sold the property.

APPEAL from the Circuit Court for *Waupaca* County.

This is an action of replevin to recover possession of a printing-office outfit. It appeared by the plaintiffs' evidence that the property had been sold to one F. Cleary while the action was pending. The defendants asked leave to amend the answer so as to set out "that, as it now appears, the plaintiffs are not the real parties in interest in the action." Leave to so amend was denied. The defendants then moved for a nonsuit on two grounds: "First, on the ground that the plaintiffs are not the parties in interest; second, on the further ground that there has been a sale of this property since the action was commenced." This motion was also denied. The contention in this court involved the correctness of this ruling only. There was a verdict and judgment for the plaintiffs, from which the defendants appeal.

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Charles D. Smith, for the appellants, contended, *inter alia*, that in an action of replevin the court should inquire into the title and possession of the property down to the day of trial. *Johnson v. Neale*, 6 Allen, 229; Cobbey, Replevin, sec. 97; *Mitchell v. Roberts*, 50 N. H. 486; *Richardson v. Reed*, 4 Gray, 441; *Knapp v. Smith*, 27 N. Y. 277; *Marshall v. Cunningham*, 13 Ill. 20; *Philbrick v. Goodwin*, 7 Blackf. 18; *Hamilton v. Mitchell*, 6 id. 131. If it appears that a change in possession or ownership has taken place during the pendency of the suit, defendant is entitled to judgment. See cases cited in brief of counsel in *Wilde v. Paschen*, 67 Wis. 91; also, *Ingraham v. Martin*, 15 Me. 373; *Whitwell v. Wells*, 24 Pick. 25; *Walpole v. Smith*, 4 Blackf. 306; *Davis v. Harding*, 3 Allen, 303; *Dawson v. Wetherbee*, 2 id. 461; *Simpson v. McFarland*, 18 Pick. 430; *Collins v. Evans*, 15 id. 65; *Allen v. Darby*, 1 Show. 99; *O'Connor v. Blake*, 29 Cal. 313; *Wheeler v. Train*, 4 Pick. 168; *McNeal v. Leonard*, 3 Allen, 268; *Hubloun's Case*, Skin. 65; *Parker v. Mellor*, 1 Ld. Raym. 217; *Presgrave v. Saunders*, 2 id. 984.

T. L. Cleary, for the respondents, to the point that a transfer of title did not abate the action, cited *McGean v. Metropolitan E. R. Co.* 133 N. Y. 9; N. Y. Civ. Pro. sec. 756; Pom. Eq. Jur. secs. 181, 231, 242; *Briggs v. Porter*, 1 N. Y. Supp. 669; *Pond v. Irwin*, 113 Ind. 343; *Demby v. Kingston*, 60 Hun, 294; *Perkins v. Marrs*, 15 Colo. 262.

The following opinion was filed May 1, 1894:

NEWMAN, J. The contention in this case is settled by a plain provision of the Revised Statutes. Sec. 2801, on the subject "Survival of Actions and Change of Parties," reads: "In case of a transfer of interest or devolution of liability the action may be continued by or against the original party, or the court may direct the person to whom the interest is transferred, or upon whom the liability is devolved,

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to be substituted in the action or joined with the original party, as the case may require." This statute is too plain to admit of construction, and it is not easy to see how words can make its meaning plainer or more easily understood. It is objected that the plaintiffs transferred their interest in the property and suit to F. Cleary while the action was pending. In such a case the statute reads, "the action may be continued by or against the original party." That is precisely what was done in this case. It could not be error. The statute having provided specially for this specific case, it is excepted from the general rule that "every action must be prosecuted in the name of the real party in interest," as certainly as the cases excepted in sec. 2605.

By the Court.— The judgment of the circuit court is affirmed.

A motion for rehearing was denied October 2, 1894.

HAWLEY and another, by guardian *ad litem*, Appellants, vs. TESCH and others, Respondents, and HAWLEY and others, Appellants.

HAWLEY and another, by guardian *ad litem*, Respondents, vs. MUNKWITZ, imp., Appellant.

February 7 — October 2, 1894.

Trusts and trustees: Fraudulent sale of lands: **Bona fide** ***purchasers: Partnership: Agency: Waiver of right to recover specific property: Accounting: Improvements made by fraudulent vendee: Interest on moneys not paid into court.***

1. **Lands held in trust were secretly conveyed by the trustee, in fraud of the trust, for the benefit of himself and his son-in-law, B. Parts thereof were afterwards sold for a fair consideration to an-**

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other son-in-law and to the housekeeper of the trustee, who were ignorant of business affairs and relied implicitly upon the statements and honesty of B. *Held*, that the relationship of said vendees to the trustee was not conclusive evidence that they knew of the fraud; nor, under the circumstances, did the fact that they bought from B. but received deeds executed by the trustee charge them with knowledge of any breach of the trust.

2. Other purchasers of a portion of the lands paid a full and adequate consideration therefor to the trustee, who was an old resident and a prosperous business man and had always borne a good reputation. A finding of the trial court that they had no notice of the fraud of the trustee is *held* to be sustained by the evidence, although it appeared that there was a close relationship and friendship between them and the trustee and his son-in-law B., and that they never took any pains to ascertain whether B. (who ostensibly joined them in the purchase) paid anything for his interest in the land. WINSLOW, J., dissents.

3. Pursuant to a partnership agreement, each of the three partners individually bought an undivided one-third part of certain lands and contributed it to the capital stock of the firm. *Held*, that the purchase was not in any sense a purchase by the firm, and that the fraud of one of the partners in the acquisition of his one-third did not affect the purchases of the others.

4. An agent for the sale of land may abandon his agency, with the knowledge and consent of his principal, and join with others in purchasing the land from such principal. *O'Dell v. Rogers*, 44 Wis. 136, distinguished.

5. *Per* WINSLOW, J. Where, in an action by the *cestuis que trustent* to set aside as fraudulent sales of land by the trustee, an interlocutory order is made adjudging that the defendants are *bona fide* purchasers and ordering a reference to ascertain the amount for which the trustees should account, if the plaintiffs do not appeal from such order, but appear before the referee and prosecute to judgment their claim for the consideration moneys of the sales, they should be held to have abandoned their claim to recover the specific property.

6. A purchaser of lands held in trust, who actively participated in the actual fraud of the trustee for which the sale is set aside at the suit of the *cestuis que trustent*, cannot be credited with improvements voluntarily made on the land; but he may be credited with taxes paid and with the necessary expenses of making sales of the lands to *bona fide* purchasers, of which sales the plaintiffs receive the benefits.

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7. One who held moneys belonging to a trust estate, but which were claimed by another, was properly charged with simple interest thereon from the commencement of an action therefor by the *cestuis que trustent*, where the other claimant was a party to the action and the holder of the moneys did not bring them into court for the benefit of whichever party should finally be adjudged to be the owner.

APPEALS from the Circuit Court for *Milwaukee* County.

This is an action in equity brought to set aside as fraudulent certain sales of real estate made by *John H. Tesch* and Helen Hawley, executors of the will of Cyrus Hawley, and for an accounting. A demurrer to the complaint was overruled upon appeal to this court. See *Hawley v. Tesch*, 72 Wis. 299.

Cyrus Hawley died June 1, 1871, testate, appointing his widow, Helen Hawley, his son Cyrus Tomlinson Hawley, and the defendant *John H. Tesch* executors and trustees of his will. He died seised of sixty-six acres of land in the town of Wauwatosa, Milwaukee county, and nearly one hundred acres within the city limits of the city of Milwaukee, bounded on the north by Chestnut street, on the south by Grand avenue, on the east by Twenty-Third street, and on the west by Twenty-Seventh street. By his will, which was probated July 3, 1871, he gave the sixty-six acres of land in Wauwatosa to a son, Walliston Kent Hawley. He gave to his wife the use during her life of his homestead, which consisted of that part of the 100-acre tract lying between Grand avenue and Wells street. He gave to her also his personal property and household furniture, and a dwelling house, and directed his executors or trustees to pay her sufficient money to support her, and such of her children and grandchildren as should live with her, until the sum of $20,000, later mentioned in the will, should be received and paid over to the trustee appointed to receive it. The residue of his estate he devised to his executors,

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and the survivor of them, in trust for certain purposes, among which was to accumulate a fund of $20,000, which, when accumulated, was to be paid over to Cyrus T. Hawley, to hold in trust and to loan on real estate security and pay over the interest thereon to said Helen Hawley, and, if necessary for her support, to pay her also such part of the principal as should be necessary to maintain her. Other trusts were created by said will in favor of his grandchildren, the appellants in this action, which are unnecessary to be stated here, and full power was given to the executors to sell at public or private sale, for cash or on credit, all the property thus devised to them in trust. All of the executors named in the will accepted the trust and qualified.

The plaintiffs, *Helen Hawley* and *Tomlinson Kent Hawley*, are the children of Cyrus Tomlinson Hawley, who died February 10, 1880. They are still minors. The defendants *Robert N. Hawley*, *Clara D. Hawley*, and *Helen A. Hawley* are the children of Charles W. Hawley, who died prior to the commencement of this action, and he was a son of Cyrus Hawley. The plaintiffs and the three last-named defendants are the only persons interested in the estate of Cyrus Hawley, except the widow, Helen Hawley. Cyrus T. Hawley became the active executor of the estate, and gave his whole time to the management thereof until his death. Helen Hawley, the mother, was over seventy years of age and was mentally weak, and never took any active part in the administration of the estate.

Prior to the death of Cyrus Tomlinson Hawley in 1880, some part of the lands devised in trust to the executors had been sold by him under the power of sale in the will, and deeds made by the executors. Some streets had also been opened through the land, and grading had been done to fit the land for sale. At the time of Cyrus T. Hawley's death, no part of the $20,000 fund for the support of the

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widow had been raised, and the estate was in debt to the amount of $12,000 or $13,000. In December, 1883, the circuit court of Milwaukee county duly appointed the defendant *Tesch* as special trustee to have charge of the $20,000 fund, in place of Cyrus Tomlinson Hawley, deceased. It was found upon the death of C. T. Hawley that his accounts were in serious confusion, and that he had appropriated moneys of the estate to his own use. *Mr. Tesch* thereupon became and continued to be the active executor of the estate.

For the alleged purpose of raising the $20,000 trust fund, *Tesch*, on the 1st day of August, 1881, made a contract with *Louis D. Vogel*, of St. Louis, for the sale to him of all the remaining lots and lands belonging to the estate, except certain lots partly within the limits of the plank road, and except all but the west one hundred feet of the homestead block, for the price of $30,000. This contract was signed by Helen Hawley, the widow, on the representation, made by *Tesch*, that it was absolutely necessary in the course of the settlement of the estate. This contract was never recorded. Although nominally it was a contract with *Vogel*, it was in fact a contract made for the benefit of *Imre Boos*, a son-in-law of the defendant *Tesch*. *Vogel* was a resident of Missouri, and occupied a clerical position in a manufacturing establishment in that city. He was a nephew of *Tesch's* wife. *Boos* was indebted to *Tesch*, his father-in-law, in the sum of about $25,000, which he had no means of paying. He assisted his father-in-law, *Tesch*, in the drug business in the city of Milwaukee, and also aided *Tesch* in his real-estate operations. The arrangement between *Tesch* and *Vogel* and *Boos* was that *Vogel's* interest in the contract should be one twentieth for the use of his name, and *Boos* should have the remaining nineteen twentieths. *Boos'* interest in the contract was concealed from the *Hawleys*, and was not discovered until shortly prior to the com-

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mencement of this suit. *Vogel* paid no attention whatever to the land after the purchase. It was arranged that *Boos* should act as the agent of *Vogel*, and *Boos* and *Tesch* retained charge of the land, made sales and improvements, and opened an account with *Louis D. Vogel* on the books of *J. H. Tesch* at the drug store. The proceeds of all sales of real estate made after August 1, 1881, were credited to *Vogel* upon this account, and he was charged with all disbursements made for improvements and taxes and other expenses. *Boos* and *Vogel* never made any payment whatever upon the contract, or, if any, it was merely a nominal sum. *Boos* and *Tesch* proceeded to open streets through lands, and spent large sums of money in grading the same, and made sales as rapidly as possible. As the contract with *Vogel* was never recorded, the deeds upon these sales were all made by *Tesch* and Helen Hawley as surviving executors, and, if mortgages were given back, they were made payable to such surviving executors. The consideration for such sales was, however, credited by *Tesch* and *Boos* to the account of *Vogel*, and after the account of *Vogel* was closed in November, 1883, to the account of *Boos*, and the defendant *Tesch* was repaid, out of the receipts arising from the sales, the $25,000 which *Boos* owed him on August 1, 1881. The sales made in this way to innocent purchasers amounted to nearly $90,000, which the plaintiffs have not attempted to set aside in this action, but for which the defendants *Boos* and *Vogel* and *Tesch* have been required to account by the judgment in this action, with interest at seven per cent., figured with annual rests.

The defendants *Vogel* and *Boos* had also caused to be made to themselves conveyances of a few lots covered by the contract, for which they paid no money to the estate, and which they treated as a division among themselves, in land, of part of the profits of the contract. These conveyances were also set aside as null and void by the decree of

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the circuit court. *Boos* erected a dwelling and barn upon the lots so set off to him in severalty, and occupied the same down to the 11th day of April, 1891, when he surrendered possession thereof to John Johnston, who had been appointed trustee of the Hawley estate in the place of *Tesch* and Helen Hawley, who had been removed by an order of the circuit court.

In the latter part of the year 1883, there was still unsold of the trust property about 200 city lots, and three sales were then or soon thereafter made, by which all, or substantially all, of said property was closed out. One of these sales was to the defendant *W. D. Anderson*, and covered several lots, for the consideration of $4,000. Another sale was to the defendant *Emma Eckstein*, covering five lots, for the consideration of $2,000. And the other sale was to the defendant *Charles J. Munkwitz* for the benefit of himself, W. W. Coleman, since deceased, and the defendant *Boos*, in equal shares, and covered nearly 200 lots; the consideration named in the deed being $50,000, but the actual consideration in fact was $75,000. All of these sales are attacked by the plaintiffs as being fraudulent and void, and they claim that they should be set aside, and the title of the property covered by said deeds should be held to be still in said estate. The defendant *William D. Anderson* is a son-in-law of *Tesch*, the defendant *Emma Eckstein* was the housekeeper of *Tesch*, the defendant Coleman was a brother-in-law of *Tesch*, and the defendant *Munkwitz* was intimately acquainted with both *Boos* and *Tesch* and knew the relationship between them. On the part of *Munkwitz* and the heirs of Coleman, who have been substituted as defendants in this action since the death of W. W. Coleman, it was insisted that they were innocent purchasers, without knowledge of any fraud, and the same claim was made by the defendants *Anderson* and *Eckstein*.

The circumstances as to the *Munkwitz* and Coleman pur-

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chase are as follows: *Boos* pretended and gave out to *Munkwitz* and to Coleman that the land belonged to the Hawley estate, and proposed that Coleman and *Munkwitz* should purchase the same as a good investment at the price of $80,000, *Boos* pretending at the time to act simply as the agent of the trustees. Coleman and *Munkwitz* declined to purchase alone, but consented to make the purchase at $75,000, provided *Boos* would take a one-third interest in the purchase. Thereafter negotiations were made with *Tesch* for the purchase, *Tesch* pretending to act as the representative of the Hawley estate, but in fact acting for *Boos*, and *Boos* pretending to act as a purchaser with *Munkwitz* and Coleman, but in fact acting secretly as a seller of two thirds of the property to them. These negotiations took place in November, 1883, or about that time, and, as a result or in course thereof, *Munkwitz*, Coleman, and *Boos* concluded to purchase, and made a written contract, dated November 2, 1883, of partnership, which recited that they had that day entered into a partnership with a capital of $90,000 for the purpose of buying, improving, and selling the Hawley real estate, each of them to share one third of the gain or loss; the said real estate to be described in a deed which was to be made by *John H. Tesch* and Helen Hawley, as surviving executors, to *Charles Munkwitz*, and held by him in trust for the three; the purchase price of $75,000 to be paid by the subscribers in equal proportions, each one third,— $45,000 in cash, and for the remainder of $30,000 each was to give his individual notes amounting to $10,000. The sum of $15,000 of the capital stock was to be reserved for the purpose of making all necessary improvements, and was to be paid equally by the subscribers, each one third. The duties of the subscribers were also prescribed in this agreement, by which it appeared that *Charles Munkwitz* was to receive and pay out and keep account of all moneys, and call meetings of the par-

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ties; Coleman was to give the influence of his publication and advertise the property; and *Boos* was to superintend all grading and improvements that might be necessary, and act as agent in selling lots. A deed of the property, made by the executors, *Tesch* and Hawley, was delivered November 5, 1883, and another deed, for the purpose of correcting some errors in the previous deed, was made in May, 1884. Coleman and *Munkwitz* each paid to *Tesch* the full amount of $25,000 for an undivided one-third interest in the land described in the *Munkwitz* deed, and they knew nothing of the *Vogel* contract or *Boos'* interest in the land before making such payments. *Boos* paid nothing for the remaining one-third interest, but claimed and still claims to hold his third interest under the *Vogel* contract. Of the $50,000 received by *Tesch* from Coleman and *Munkwitz*, $20,000 was invested in a mortgage for that amount, bearing interest at six per cent. per annum, and *Tesch* held the same in trust for the use and benefit of Helen Hawley, under the provisions of said will, until his removal as trustee. The remaining $30,000 paid by Coleman and *Munkwitz* was turned over by *Tesch* as fast as it came into his hands to *Boos*, or applied upon *Boos'* private account. After the *Munkwitz* deed was made and delivered, *Munkwitz*, Coleman, and *Boos* proceeded to further improve the property, grade the same and lay out streets, build sidewalks and sewers, and proceeded to sell portions thereof to innocent purchasers.

After a long trial in the circuit court, the circuit judge in September, 1890, made the findings of fact substantially as above set forth, and held the *Vogel* sale to be fraudulent and void, and required the defendants *Tesch*, *Boos*, and *Vogel* to account for all sums received upon the sale of lots to innocent purchasers after the execution of such contract, with interest at seven per cent. The circuit court also set aside entirely the *Vogel* contract, and set aside the convey-

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ances to *Boos* and *Vogel* in pursuance thereof, as fraudulent and void. The circuit court, however, held the defendants *Eckstein*, *Anderson*, *Munkwitz*, and the heirs of W. W. Coleman to be *bona fide* purchasers, without notice of any fraud, but required *Munkwitz* to convey *Boos'* undivided third part of the unsold lands which had been conveyed to *Munkwitz* to the trustees of the estate. An interlocutory order or judgment was also entered at the same time upon the findings, ordering and adjudging the removal of *Tesch* and Helen Hawley as trustees, and the appointment of John Johnston in their stead, and requiring the former trustees to pay over all trust property in their hands to the said Johnston. It was further adjudged that *Boos* and *Vogel* convey to Johnston, the trustee, all the lots to which they had obtained title; also, that *Munkwitz* convey to the trustee one third of the lands remaining unsold covered by the *Munkwitz* deed; also, that *Munkwitz* account and pay over to said trustee one third of the proceeds derived from all sales to *bona fide* purchasers made from said lands, less one third of the expenses for improvements and taxes paid. As to the remaining two thirds of said lands, and the moneys derived from the sale of such part thereof as had been sold to innocent purchasers, it was adjudged that *Munkwitz* and the heirs of Coleman were the owners thereof. It was further adjudged that the defendants *Anderson* and *Eckstein* were innocent purchasers of the lots conveyed to them, without notice of any fraud. It was further ordered that the defendants *Munkwitz*, *Boos*, *Vogel*, and *Tesch* account under oath, before Hugh Ryan, Esq., court commissioner, as referee, for the proceeds and avails of all of the lands sold by them which were included in the *Vogel* contract, after deducting the amount actually expended by them in the improvement of said property and for the payment of taxes thereon; also, that they account for the value of the lots and profits of the lands actually

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used and occupied by or under either of the said defendants *Boos*, *Vogel*, and *Tesch*, and that said accounting be had upon the principle of partial payments, with annual rests on the 1st day of August in each year, with interest computed at the rate of seven per cent. per annum on each balance. It was further adjudged that the defendant *Munkwitz* state under oath to the referee the number and description of lots remaining unsold, and account for the amounts received from the sale of lots included in the *Munkwitz* deed and the amount expended for improvements of the lands and paid for taxes and assessments. It was further ordered that, as to the defendants *Anderson*, *Eckstein*, and the heirs of W. W. Coleman, said complaint be and was thereby dismissed, and also that the complaint be dismissed as to the defendant *Munkwitz*, except for the purposes of an accounting as aforesaid.

Numerous exceptions were filed to the aforesaid findings on behalf of the plaintiffs, *Helen Hawley* and *Tomlinson Kent Hawley*, and also on behalf of the defendants *Robert N. Hawley*, *Clara D. Hawley*, and *Helen A. Hawley*, but no appeal was taken from that order, and thereafter the accounting was proceeded with before the referee on the principles laid down in the order.

Upon the coming in of the report of the referee, the same was confirmed, and thereupon final judgment was rendered, reaffirming the removal of the former trustees, *Tesch* and Helen Hawley and the appointment of John Johnston in their stead; setting aside and declaring null and void the *Vogel* contract of August 1, 1881; also, setting aside all deeds of lots made by the executors to *Imre Boos* and to *Louis D. Vogel;* also, approving and confirming a conveyance made by *Munkwitz* and wife to Johnston, as trustee, October 7, 1891, of the undivided one-third of the real estate covered by the *Munkwitz* deed which had not been sold to innocent purchasers, and divesting *Boos* of all title

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to said undivided one-third; also, adjudging that the defendants *Boos* and *Vogel* pay to Johnston, as trustee, the sum of $102,811.55, with interest at seven per cent. per annum from August 1, 1892, and, in case said *Boos* and *Vogel* failed to pay the same, that said *Tesch* pay the same to said Johnston, as trustee aforesaid; also, adjudging that the defendant *Boos* pay to the trustee certain smaller sums, amounting in all to the sum of $2,164.82, arising out of land covered by the *Munkwitz* deed; also, that *Munkwitz* assign to Johnston, as trustee, an undivided one-third of certain contracts for the sale of land, being a part of the lands covered by the *Munkwitz* deed. It was further adjudged that *Munkwitz* was an innocent purchaser of an undivided one-third of the land conveyed to him by the executors' deed; that Coleman was an innocent purchaser of another undivided one-third of said land; and that the defendant *Eckstein* was an innocent purchaser of the lots conveyed to her, and that the defendant *Anderson* was an innocent purchaser of the lots conveyed to him. As to all these innocent purchasers the action was dismissed, with costs. The plaintiffs recovered costs of the defendants *Tesch*, *Boos*, and *Vogel*.

The plaintiffs and the defendants *Robert N. Hawley*, *Clara D. Hawley*, and *Helen A. Hawley* appealed from so much of the final judgment as adjudges — first, that the defendants *Munkwitz*, *Coleman*, *Anderson*, and *Eckstein* were innocent purchasers of the real estate conveyed to them; second, that the defendant *Boos* should be allowed the sum of $5,000 on account of the house and barn built by him upon a part of the property; third, that the defendants *Boos* and *Vogel* should be allowed for the money spent by them for grading and other improvements and taxes in the management, care, and sale of the property embraced in the *Vogel* contract; fourth, that the defendant *Boos* should be allowed one third the money expended by the firm of Munkwitz, Coleman & Boos for improvements and

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taxes and other expenses in the management and sale of the property conveyed to *Munkwitz;* fifth, that the defendants *Boos* and *Vogel* should not be charged for damages sustained by the estate for mismanagement in handling and disposing of the property.

The defendant *Munkwitz* appealed from that part of the judgment which required him to pay $1,133.23, as interest from January 1, 1888, to September 19, 1890, at seven per cent. per annum, upon $5,956.58, which the referee found that *Mr. Munkwitz* had in his hands on account of the one-third interest of the defendant *Boos* in the lands conveyed by the *Munkwitz* deed.

All the appeals were argued together in this court.

For the plaintiffs, *Helen Hawley* and *Tomlinson Kent Hawley*, there were briefs by *Wells, Brigham & Upham*, and oral argument by *J. R. Brigham* and *H. A. Upham.* They contended, *inter alia*, that a sale of trust property is void as to all purchasers, if the agent of the trustee is joined in the sale as one of the purchasers. The general rule is that a sale by a trustee to himself, his attorney, his agent, or to anyone occupying any fiduciary relation to the trust, is void or voidable at the election of the *cestui que trust*, and the question of the fairness of the sale or the price is immaterial. *King v. Remington*, 36 Minn. 15; *O'Dell v. Rogers*, 44 Wis. 136; *Hoffman Steam Coal Co. v. Cumberland C. & I. Co.* 16 Md. 456; *Cook v. Berlin W. M. Co.* 43 Wis. 433; *Keith v. Kellam*, 35 Fed. Rep. 243; *Pooley v. Quilter*, 2 De G. & J. 327; *Ex parte Burnell, re Lincoln*, 7 Jurist, Part I, 116; *Mitchum's Heirs v. Mitchum Adm'rs*, 3 Dana (Ky.), 260. The court will not permit a third party to obtain any interest in trust property by joining with the trustee in the sale. The whole sale is void. The fact that the purchaser knew that his co-purchaser was incapacitated from purchasing is sufficient to avoid the whole sale.

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The deed to *Munkwitz* should be set aside both as to him and as to Coleman upon the ground that they had knowledge of such facts as would put a prudent man upon inquiry. *Brinkman v. Jones*, 44 Wis. 519; *Hooser v. Hunt*, 65 id. 71; *Shaw v. Spencer*, 100 Mass. 382; *Duncan v. Jaudon*, 15 Wall. 175; *Hoppin v. Doty*, 25 Wis. 573. Innocence and want of actual knowledge of fraud is no defense if the party had notice of the facts from which the law may infer fraud. *Wormley v. Wormley*, 8 Wheat. 449. The law considers certain things necessary to be done in order to enable a person to be a *bona fide* purchaser of trust property from trustees, and a prudent man would act accordingly. He must have actually paid the whole price, and he must have got his deed before notice. 1 Perry, Trusts, §§ 219, 221; Story Eq. Jur. § 1502; *Hoffman Steam Coal Co. v. Cumberland C. & I. Co.* 16 Md. 479; *Wormley v. Wormley*, 8 Wheat. 421, 450; *Everts v. Agnes*, 4 Wis. 343; *Nantz v. McPherson*, 7 Mon. (Ky.), 597, 600; Willard, Eq. Jur. (Potter's ed.), 609; *Palmer v. Williams*, 24 Mich. 333; *Burton v. Reagan*, 75 Ind. 77; *Paul v. Fulton*, 25 Mo. 156; *Dugan v. Vattier*, 3 Blackf. 245. Giving security is not equivalent to payment. Sugden, Vendors, *753; 1 Perry, Trusts, § 219; Willard, Eq. Jur. 609; *Jackson v. Cadwell*, 1 Cow. 622; *Jewett v. Palmer*, 7 Johns. Ch. 65; *Patten v. Moore*, 32 N. H. 382; *McBee v. Loftis*, 1 Strob. Eq. (S. C.), 90; *Harris v. Norton*, 16 Barb. 264; *Rhodes v. Green*, 36 Ind. 10; *Thomas v. Graham*, Walker, Ch. (Mich.), 117. Again, a prudent purchaser would see to actual payment of the money to the trustees, and get a receipt for the purchase price. 2 Perry, Trusts, §§ 790, 806, 808; Lewin, Trusts, 474. Again, a prudent purchaser would make some inquiry and ascertain if the sale was satisfactory to the *cestuis que trustent*. Again, the purchase of real estate from trustees is something more than ordinary buying and selling, and no prudent man would undertake himself to perfect

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such a purchase. 2 Sugden, Vendors (8th Am. ed.), 531, *756; *Boursot v. Savage*, L. R. 2 Eq. Cas. 141; *Kennedy v. Green*, 3 Mylne & K. 713. Again, a prudent purchaser would not leave the drawing of the deed to the purchaser or his agent. If he does so, he is bound by notice, actual or constructive, of any defect in the title that such seller or agent may have acquired in the completion of such sale, although such seller or agent may conceal the same from the purchaser. *Spencer v. Topham*, 2 Jurist (N. S.), 865; *Majoribanks v. Hovenden*, 6 Ir. Eq. 238; *Espin v. Pemberton*, 3 De G. & J. 547; *McMahon v. McElroy*, 5 Ir. Rep. Eq. 1. All authorities agree that it is a matter of suspicion and requiring inquiry, where the trustee is selling the trust estate to a relative. Such a sale is not of itself void, but it is suspicious, and no person is justified in joining in any such sale without having made the fullest inquiry that the sale is fair and satisfactory to all the *cestuis que trustent*, and that the money is actually paid to the trustees.

The conveyance to *Munkwitz* is void for the reason that it was made in reality to the partnership composed of *Boos*, *Munkwitz* and Coleman, and notice to one partner is notice to all. *King v. Remington*, 36 Minn. 15; *Sanders' Heirs v. Ruddle*, 2 Mon. (Ky.), 139; *Kilby v. Wilson*, Ryan & M. 178. If a person seeks to avail himself of the benefits of a transaction made for him through the aid of another party, he thereby makes such party his agent and ratifies the acts of such agent, and takes the benefits subject to all the disabilities by which the transaction was effected. He cannot claim the benefits without being subject to the disabilities. 5 Am. St. Rep. 109, note; Mechem, Agency, §§ 130, 148, 167, 174; Wade, Notice, § 668; *Graves v. Spier*, 58 Barb. 349, 386, 387; *McLean v. Clark*, 47 Ga. 25, 70; *Olmsted v. Hotailing*, 1 Hill, 318; *Bennett v. Judson*, 21 N. Y. 239; *Elwell v. Chamberlin*, 31 id. 611, 619; *Stewart*

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v. Johnson, 18 N. J. Law, 87; *Presby v. Parker*, 56 N. H. 409. The refusal of *Munkwitz* and Coleman to return the property bought through the aid of *Boos*, and the retention of the benefits arising therefrom, are equivalent to ratification of all that *Boos* did to effect the sale, and *Boos* must be treated as their agent, and they are bound by all the knowledge that *Boos* had. In this view of the case, it is immaterial whether the sale was a sale of the whole property to the partnership of *Munkwitz*, Coleman & *Boos*, or a sale of separate undivided thirds to *Munkwitz*, Coleman, and *Boos*. In either event the sale was brought about through the aid and agency of *Boos*, and but for his agency neither *Munkwitz* nor Coleman would ever have purchased an interest in the property. In order that the knowledge of an agent may not bind his principal, the agent must be committing, in the same transaction in which he is employed as agent, an independent fraud for his own benefit and designedly against the principal, which fraud must be of such a nature that its existence and possibility depends upon the concealment of the real facts from the principal. Pom. Eq. Jur. § 675; *Majoribanks v. Hovenden*, 6 Ir. Eq. 238; *Hewitt v. Loosemore*, 9 Hare, 449; *Sankey v. Alexander*, Ir. Rep. 9 Eq. 260; *McMahon v. McElroy*, Ir. Rep. 5 Eq. 1; *Tucker v. Henzill*, 4 Ir. Ch. 513; *Atkins v. Delmege*, 12 Ir. Eq. 1; *Espin v. Pemberton*, 3 De G. & J. 547; *Spencer v. Topham*, 2 Jurist (N. S.), 865; *Bradley v. Riches*, L. R. 9 Ch. Div. 189; *Boursot v. Savage*, L. R. 2 Eq. 142; *Robinson v. Briggs*, 1 Smale & G. 226.

Where a person fraudulently obtains and holds possession of the real estate of another and afterwards expends money in its care and improvement, such wrong-doer is not entitled to any compensation for the money so expended. *Railroad Co. v. Soutter*, 13 Wall. 517; *Waterman v. Dutton*, 6 Wis. 265; *Thompson v. Thompson*, 16 id. 91; *Witt v. Trustees Grand Grove*, 55 id. 380; *Gaines v. Lizardi*, 1

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Wood (U. S.), 56; *Gillespie v. Moon*, 2 Johns. Ch. 602; *Woodhull v. Rosenthal*, 61 N. Y. 396, 397; 2 Kent, Comm. 338; *Holmes v. McGee*, 64 Miss. 129; *Dawson v. Grow*, 29 W. Va. 333; *Mill v. Hill*, 3 H. L. Cas. 869; *Van Horne v. Fonda*, 5 Johns. Ch. 416.

W. J. Turner, attorney for the defendants *R. N. Hawley*, *Helen A. Hawley*, and *Clara D. Hawley*, to the point that the defendants *Boos* and *Vogel* should not be allowed for the money spent by them for alleged improvements, taxes, and other expenses incurred by them in the management and sale of the property, cited 3 Pom. Eq. Jur. §§ 1240, 1241; *Witt v. Trustees Grand Grove*, 55 Wis. 376; *Blodgett v. Hitt*, 29 id. 169, 190; *Thompson v. Thompson*, 16 id. 91, 94; *Putnam v. Ritchie*, 6 Paige, 390, 405; *Pitt v. Moore*, 6 Am. St. Rep. 489, note; *Prickett v. Muck*, 74 Wis. 200; 10 Am. & Eng. Ency. of Law, 247; *Searl v. School District*, 133 U. S. 553; *Woodhull v. Rosenthal*, 61 N. Y. 382, 396; *Jackson v. Loomis*, 15 Am. Dec. 350, note; *Wood v. Wood*, 83 N. Y. 575; *Wood v. Conrad*, 50 N. W. Rep. 95; *Cable v. Ellis*, 120 Ill. 136; *Holmes v. McGee*, 64 Miss. 129; Newell, Ejectment, 631; *Carter v. Brown*, 35 Neb. 670; *Jones v. Steam Stone Cutter Co.* 20 Fed. Rep. 477.

W. H. Timlin, of counsel, for the defendants *R. N. Hawley* and others.

Joshua Stark, for the defendant *Tesch*, contended, *inter alia*, that trustees have an inherent right to be reimbursed for all expenses properly incurred in the execution of the trust. Hill, Trustees, 570; 7 Am. & Eng. Ency. of Law, 431; *Sanderson v. Sanderson*, 20 Fla. 292; *Dey v. Codman*, 39 N. J. Eq. 258; *Garves v. Owens*, 58 Hun, 609; *Davoue v. Fanning*, 2 Johns. Ch. 252; *Michoud v. Girod*, 4 How. 583; Kerr, Frauds, 333, 345, 347; 2 Perry, Trusts, §§ 910, 912, 913, 915; 2 Pom. Eq. Jur. § 1085. These allowances are made even when the trustee has acted in violation of the trust. In such case the trustee will be charged inter-

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est, and if the violation of the trust be gross, compound interest, and he may also be denied all compensation for time and services devoted to the care and disposition of the subject of the trust; but while he will be charged interest and denied compensation, he will be allowed actual disbursements necessarily incurred in the management of the estate, or clearly beneficial thereto, either as enhancing its value or increasing its productiveness. In many cases such allowances are made to persons held to be trustees by implication, on the ground of fraud. *Fox v. Mackreth*, 1 Lead. Cas. Eq. (3d Am. ed.), 206, 219; *Oliver v. Court*, 8 Price, 127, 172; *Baugh v. Price*, 1 Wilson, 320; *Ebelmesser v. Ebelmesser*, 99 Ill. 541; *Kinney v. Knoebel*, 51 id. 112; *Fishbeck v. Gross*, 112 id. 208; *Rotch v. Morgan*, 105 Mass. 426; *How v. Camp*, Walker, Ch. 427.

For the defendants *Munkwitz*, *Eckstein*, and *Anderson* there were briefs by *Winkler*, *Flanders*, *Smith*, *Bottum & Vilas*, and oral argument by *F. C. Winkler*. They argued, among other things, that the appellants cannot maintain the inconsistent position of prosecuting an appeal with intent to get the lands, after appropriating and holding the price at which they were sold. *Murphy v. Spaulding*, 46 N. Y. 556; *Genet v. Davenport*, 60 id. 194; *Carll v. Oakley*, 97 id. 633; *Bennett v. Van Syckel*, 18 id. 481; *Webster-Glover L. Mfg. Co. v. St. Croix Co.* 71 Wis. 317. One who accepts the benefit of an order or the condition of an order waives the right to appeal therefrom. *Flanders v. Merrimac*, 44 Wis. 621; *Cogswell v. Colley*, 22 id. 399; *Pettit v. Hamlyn*, 42 id. 434; *Abbott v. Johnson*, 47 id. 239; *Likens v. McCormick*, 39 id. 313; *Smith v. Coleman*, 77 id. 343. The same rule applies to all cases of fraud. One who proves a debt under an assignment thereby waives all objection to the assignment which is known to him or of which he has notice at the time of his proofs. *Littlejohn v. Turner*, 73 Wis. 113. So, too, a creditor who has been defrauded of

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his goods, if he sue for and obtain judgment for the price (knowing the fraud), or proves his claim against an estate in insolvency, thereby waives his right to recover the property. *Ormsby v. Dearborn*, 116 Mass. 386; *Seavey v. Potter*, 121 id. 297; *Stoutenburgh v. Konkle*, 15 N. J. Eq. 33. Even the bringing of a suit for the price, which is discontinued, will have the same effect if brought with knowledge. *Bulkley v. Morgan*, 46 Conn. 393; *Adler v. Fenton*, 24 How. 407; *Dibblee v. Sheldon*, 10 Blatchf. 178; *Dellone v. Hull*, 47 Md. 112; *Emma Silver Mining Co. v. Emma S. M. Co. of N. Y.* 7 Fed. Rep. 424; *Bach v. Tuch*, 126 N. Y. 53. So the taking of security for the price waives the fraud and precludes the right of recovering the property. *Joslin v. Cowell*, 52 N. Y. 91.

E. Mariner, for the defendants *Coleman*.

The following opinion was filed June 2, 1894:

WINSLOW, J. That part of the judgment of the circuit court which set aside as fraudulent and void the ostensible sale of the great bulk of this valuable estate to *Vogel* for the benefit of *Boos*, the son-in-law of *Tesch*, and of *Tesch* himself, is not appealed from. Its justice is not and could not be questioned. This transaction bore all the badges of fraud known to the law. It was a sham; it was kept secret; it was a conveyance by the trustee of the trust property nominally to another, but in reality to himself and his son-in-law; the nominal consideration was grossly inadequate, and was not in fact paid except as the sales of property afterwards paid it; it was a deliberate scheme to divert from the proper beneficiaries a handsome fortune, which was well-nigh successful. Rarely, we believe, has a court of equity been required to review and condemn so flagrant a breach of duty on the part of a trustee. Let us hope that such occasions will be even more rare in the future.

The important questions raised by the appeal of the

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grandchildren which we deem it necessary to discuss are substantially three in number. They are: First, were *Munkwitz*, Coleman, *Anderson*, and *Eckstein* innocent purchasers without notice of fraud by the trustees? Second, should *Boos* and *Vogel* be allowed in the accounting for improvements put by them upon the land? Third, should *Boos* and *Vogel* be charged with damages for mismanagement in handling and disposing of the property?

1. The circuit court acquitted the purchasers named in the first question of all complicity in, and of all notice, either actual or constructive, of, the fraud of *Tesch* and *Boos*, and consequently upheld their titles as *bona fide* purchasers, and required *Boos*, *Vogel*, and *Tesch* to account for the proceeds of the sales made to them, with interest.

We shall spend but little time considering the question as to the *bona fides* of the purchases of *Anderson* and *Eckstein*. It is true that the relations between these purchasers and *Boos* and *Tesch* were intimate. *Anderson* was the son-in-law of *Tesch*, and *Eckstein* was his housekeeper. These facts are very proper to be considered in determining the question of fraud, but they are by no means conclusive. Good faith may still exist, notwithstanding this close relationship. The prices which they paid do not, under the testimony, seem to have been inadequate. Certainly there cannot be said to have been in either case any such disparity between the value of the land and the price paid as would stamp the transaction as fraudulent. It is true that they bought from *Boos* and received deeds executed by trustees, but we do not think that this fact, under the circumstances in evidence, necessarily charges them with knowledge of the existence of any breach of trust. Upon this question, the circuit judge says in his opinion: "It is so manifest that they relied implicitly upon *Boos'* statements and upon his honesty, and that they knew nothing of the *Vogel* sale and were utterly ignorant of business

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affairs, that it would be hard, if not contrary to equity, to charge them with notice of a breach of trust merely because their deeds were executed by the trustees. . . . I cannot say that they were consciously guilty of fraud, and there is certainly no such clear evidence of facts coming to their knowledge, calculated to put them upon inquiry, as to justify me in charging them with constructive fraud." We agree with the conclusions of the circuit judge on this question.

As to the *Munkwitz* and Coleman transfer, the question is one of greater difficulty. It is claimed by the appellants (1) that *Munkwitz* and Coleman had actual notice of the fraud of *Boos*, or at least were informed of such facts as should have put them upon inquiry, which, if followed up, would have led to actual knowledge; (2) that, even if this be not so, the fraud of *Boos* penetrates and vitiates the entire transaction, because *Boos* was the partner of *Munkwitz* and Coleman in the purchase, and they are legally chargeable with his fraud.

As to actual notice the circuit judge says, in the course of his opinion: "It appears by the uncontradicted evidence bearing upon that subject that neither *Munkwitz* nor Coleman knew of the sale to *Vogel*, and that neither of them knew or suspected that *Boos* had or claimed to have any interest, legal or equitable, in the Hawley estate." A very thorough examination of the evidence in the record convinces us that this statement is entirely correct, and with this remark we shall content ourselves on this point.

The contention that *Munkwitz* and Coleman had knowledge of facts which should have put them upon inquiry as to the fraud of *Boos* and *Tesch* was answered by the circuit judge, evidently after mature consideration of the evidence, in the negative. In support of the affirmative of the proposition, many facts which are either admitted or undeniably proven are urged with great vigor and ability by the ap-

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pellants' counsel. The most significant of these facts are: That *Tesch* and Coleman were married to sisters and were intimate friends; that *Boos* was married to *Tesch's* daughter, who was Coleman's niece; that *Vogel* was the nephew of both *Tesch* and Coleman; that both *Munkwitz* and Coleman knew that the title was in *Tesch* and Mrs. Hawley as trustees, and that both were active and intelligent business men; that Coleman and *Boos* were on intimate terms, and that Coleman had previously assisted *Boos* in embarking in the distillery business; that Coleman and *Boos* had dealt in mining stocks together; that *Boos* was almost constantly on the land, superintending grading and other improvements, with all the appearance of an owner; that *Boos* and *Munkwitz* were old acquaintances and quite intimate; that neither *Munkwitz* nor Coleman took any pains to ascertain whether *Boos* paid anything for his one-third interest in the land; and, further, that *Munkwitz* made contradictory statements as to his negotiations with *Boos* and *Tesch*, and as to whom he in fact dealt with.

It is unfortunate, in dealing with this question, that we have not the benefit of the testimony of Mr. Coleman, who died after the commencement of the action and before his testimony could be taken. Coleman was the most active man in the making of this purchase. It was to Coleman that *Boos* first suggested the purchase of the land, and Coleman seems to have principally conducted the negotiations on behalf of himself and *Munkwitz* with *Tesch*. Doubtless Coleman could have thrown much light on many matters which are now obscure, but we have not that light, and the case must be decided upon the evidence actually before us.

It is certainly true that many facts in the case, notably those above referred to, showing the close relationship and friendship which existed between *Tesch*, *Boos*, *Munkwitz*, and Coleman, tend to throw considerable doubt upon

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the *bona fides* of *Munkwitz* and Coleman in this transaction; but, on the other hand, there are other facts equally undeniable which tend strongly to establish their entire good faith. Among these may be noticed two important facts, viz., that the sale was for a full and adequate consideration, which, so far as the shares of *Munkwitz* and Coleman were concerned, was paid at once; that *Tesch*, the trustee, was an old resident of Milwaukee, a prosperous business man, and a man who had always hitherto borne a good reputation. The circuit judge evidently considered these facts of great weight, and properly so. It is true these facts alone are not conclusive proof of good faith, nor, on the other hand, are the facts relied upon by appellants conclusive evidence of bad faith. It is, after all, a question of fact from the evidence whether actual knowledge, or notice equivalent to actual knowledge, of the fraud of *Tesch* and *Boos* was proven. Can we say that the conclusions of the trial court are wrong in this respect? Is there any fact proven which the court must say as matter of law is the legal equivalent of such knowledge or notice? On a review of the whole evidence, which could not be gone over in detail without filling a good-sized volume, my brethren are all of the opinion that the findings of the trial court cannot be reversed on this question. The writer of this opinion has been and still is inclined to the opinion that the evidence calls for and justifies a finding to the effect that *Munkwitz* and Coleman had knowledge of facts which should have put a prudent man upon inquiry as to the good faith of the transaction, but as he agrees with the result, upon a ground hereafter stated, he deems it unnecessary to do more than state the fact of his nonconcurrence upon this point.

We come now to the second proposition of the appellants, namely, that the fraud of *Boos* vitiates the entire transaction. In support of this contention it is said, in the

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first place, that *Boos* was a partner of *Munkwitz* and Coleman in the purchases, and therefore they must be charged with his knowledge. Of the general proposition that a firm is charged with the knowledge of facts known to one partner in the course of a partnership transaction, there can be no doubt. Had there been an existing partnership, and had *Boos* taken partnership funds and purchased real estate held in trust, knowing such purchase to be a fraud upon the *cestuis que trustent*, doubtless the whole transaction could be and should be set aside as fraudulent. This, however, is not such a case. The purchase of this land was in no sense a purchase by the firm or a purchase in the course of partnership business. It is true that the articles of agreement between *Munkwitz*, Coleman, and *Boos* bear date November 2d, and recite that the parties "have this day entered into a partnership," and it is also true that the deed of the lands to *Munkwitz* was not executed until some days afterwards, and from these facts it is argued that the conveyance was in fact a conveyance to the partnership in the course of its business, which business was the purchase and sale of this identical real estate. Upon this question the circuit judge very pertinently observes: "Equity looks not exclusively to words and names, but considers the very substance of the transactions. Following down the instrument, we find the arrangement to be that seventy-five thousand dollars of the capital stock of the partnership was to consist of lands to be purchased, not by the partnership, but by the partners individually, each to pay for or to secure by his individual notes an undivided one-third part of the land. This clearly shows that the partnership, whether it had been technically formed or not, had not gone into operation,—that the members had not as yet brought in, and were yet to bring in, each his share of the capital stock, so far as the same was to consist of land. So that it may consistently be said that *Munkwitz*

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and Coleman each bought and paid for an equal interest in this land, and that the interest of *Boos*, and his interest alone, came in through the *Vogel* sale, and that he, and he alone, was a trustee in his own wrong of the property which he contributed to the capital stock of the firm."

We see no fault with this reasoning. It seems to us to amount to a demonstration that each partner was to purchase and contribute to the capital stock of the proposed firm one third of this land, and that the firm, though nominally, perhaps, formed at the time of the agreement, had no business existence until the land was bought. Each partner was to buy his own interest in the land and pay for it with his own funds, and *Munkwitz* and Coleman did do so; and then each contributed his undivided one-third of the land, which he individually had purchased, to the capital stock of the firm.

Looking at the transaction in this light, it seems very clear that this purchase was not a purchase, in any sense, by the firm of Munkwitz, Coleman & Boos, but it consisted of individual purchases by *Munkwitz* and Coleman (and, as they supposed, by *Boos* also) separately of an undivided one-third each of the real estate, and a contribution of such one-third, after its purchase, to the capital of the firm. If this be the proper view of the legal effect of the transaction, it is clear that the purchase by *Munkwitz* or Coleman of his one-third is not affected by the fraud of *Boos* in the acquisition of his one-third. If a person who is a trustee contributes to the capital stock of a firm trust funds, his copartners not knowing their trust character, the *cestui que trust* does not thereby become a creditor of the firm. 1 Bates, Partn. § 481; 1 Ewell's Lindl. Partn. (1st ed.), 313. This is on the principle that the breach of trust or fraud is the act of the individual alone, and not the act of the firm. The same principle applies here, and its logical result manifestly is that the purchases of *Munkwitz* and Coleman, if

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made in good faith, are not affected by the fraud of *Boos* in the acquisition of his interest. *Driffill v. Goodwin*, 23 Grant, Ch. 431.

But it is said further by appellants that *Boos* was the agent of *Tesch*, the trustee, in the sale of the property, and so was incapacitated from becoming a purchaser, and that, *Munkwitz* and Coleman having joined in the purchase with the agent of the trustee, the entire sale is void. In support of this contention the case of *O'Dell v. Rogers*, 44 Wis. 136, is relied on. This case holds, in brief, that the active attorney of the executor of an estate cannot buy from the executor property of the estate, and that persons who united with the attorney in the purchase, with full knowledge of the facts affecting his disability, are also chargeable with him as trustees of the property so bought. It seems quite plain that the case is not analogous to the one at bar. Here *Boos* pretended to *Munkwitz* and Coleman that the land belonged to the Hawley estate, and assumed to act as agent of the trustees in inducing Coleman to purchase. Coleman and *Munkwitz* declined to purchase unless *Boos* would take one third. To this *Boos* consented, abandoned his pretended agency, to the knowledge of all the parties, and thereafter Coleman, *Boos*, and *Munkwitz* negotiated directly with *Tesch*. There is no principle which prevents an agent from abandoning his agency with the knowledge and consent of his principal, and then purchasing of his former principal at arm's length and upon an equal footing. This was the transaction as it appeared to *Munkwitz* and Coleman, and the difference between such a transaction and the transaction which was condemned in the case of *O'Dell v. Rogers*, 44 Wis. 136, is very plain.

We do not find it necessary to discuss the effect of the fraudulent concealment which *Boos* confessedly practiced on Coleman and *Munkwitz* in this transaction. He was in fact the owner of the property to be sold, but pretended to

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be first an agent for the sale of it, and afterwards an equal purchaser with them. It is urged with much force that this concealment of his real character in the transaction was a material and substantial fraud on his co-purchasers. It is said that there is no reason to think that they would have purchased had they known that *Boos* was in fact selling instead of buying, and instead of being interested in buying on favorable terms was in fact deeply interested in buying on the highest possible terms. It is argued that, conceding that *Boos* was a partner or agent of *Munkwitz* and Coleman in the purchase, still they will not be charged with constructive notice of the facts known to *Boos*, because *Boos* committed an independent fraud on them for his own benefit by concealing the real facts of his relationship to the property. 2 Pom. Eq. Jur. § 675, and notes. This presents an interesting question, but, as above stated, we do not find it necessary to decide it, because we have practically held that *Boos* was not acting as partner or agent of *Munkwitz* and Coleman in the making of the purchase.

The case of *King v. Remington*, 36 Minn. 15, is greatly relied upon by the appellants. We shall not attempt to review it. In many of its facts it is quite similar to the present case. There are, however, important differences in the facts, and when we hold that the purchase in the present case was an independent purchase by each party, and not a partnership transaction, a clear distinction is raised between the two cases, because in that case the purchase which was attacked was held on the evidence to have been a partnership act, so that notice to either party affected both partners.

There is another ground upon which it seems clear to the writer that the appellants cannot now recover the lands conveyed to Coleman, *Munkwitz*, *Anderson*, and *Eckstein*. The law is that a party injured by the fraudulent sale of property made by his trustee has a choice of remedies.

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He may affirm the sale and recover the price, or he may disaffirm the sale and recover back the property. But he cannot do both,—they are inconsistent remedies. In this case, the appellants by their complaint attempted to disaffirm the sale and recover the property sold, The circuit court, by its interlocutory order in the nature of a judgment, dated September 17, 1890, adjudged that *Munkwitz*, Coleman, *Anderson*, and *Eckstein* were all innocent purchasers, and that the conveyance to them passed good title, and ordered a reference to ascertain the amounts which *Boos*, *Vogel*, and *Tesch* should account for. The plaintiffs took no appeal from that order, but appeared before the referee on the hearing, and filed a long itemized account of the sales of lands made by *Boos* and *Tesch*, which they claimed *Boos* and *Tesch* should account for. Included among the items of this account were the sums received from *Munkwitz*, Coleman, *Anderson*, and *Eckstein*, and the referee in his report charged all these sums to *Boos* and *Vogel*, and they were included in the gross amount of the judgment rendered on the referee's report. It seems to me very clear that the appellants abandoned their claim to recover the specific property, and by not appealing from the interlocutory order (which was clearly appealable), but, on the contrary, prosecuting their claim to judgment against *Boos* and *Tesch* for the consideration moneys, have barred themselves from now returning to and insisting on their right to recover the specific property. This view is simply stated as the individual view of the writer of this opinion.

2. Should *Boos* and *Vogel* be credited with the amount spent by them in grading and other improvements upon the land? It appeared by the evidence that in 1885 *Boos* built a house and barn on the lots set apart to him, and occupied them as his homestead until April, 1891, when he surrendered possession to Johnston, the new trustee. The buildings cost about $10,000, but the evidence was conflicting

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as to the sum which they actually added to the market value of the lots, and $5,000 was allowed and credited to *Boos* upon the accounting on account of the increased value of the lots by reason of such house and barn. There was also allowed and credited $17,010.97 for amounts spent by *Boos* in grading and filling lots and grading and making streets through the property and laying water pipes and sewers. There was also credited to *Boos* one third of the sum of $9,061.90, which amount was spent by *Munkwitz*, Coleman, and *Boos* for grading and street work. Exception was duly taken to the allowance of all of these items, and the question is whether they were properly allowed to *Boos*. The building of the house and barn was of course purely a voluntary expenditure on the part of *Boos*. The grading and street work were not ordered by the city authorities, but the referee found that the expenditures so made were reasonable, necessary, and advantageous, and enhanced the value of the property more than the amount expended.

We are of the opinion that none of these charges can be allowed. *Boos* was a fraudulent purchaser. He is not charged merely with constructive fraud, but found and amply proven to have been an active participant in the actual and intended fraud of *Tesch*. Such a purchaser cannot, under well-established principles, be credited with improvements voluntarily made on the trust property. The decisions of this court are to this effect. *Waterman v. Dutton*, 6 Wis. 265; *Thompson v. Thompson*, 16 Wis. 91; *Witt v. Trustees*, 55 Wis. 376. For other authorities in support of the proposition, see *Railroad Co. v. Soutter*, 13 Wall. 517; *Gillespie v. Moon*, 2 Johns. Ch. 602; *Woodhull v. Rosenthal*, 61 N. Y. 389; *Dawson v. Grow*, 29 W. Va. 333; 1 Lewin, Trusts (Flint's Notes), 492. There is nothing in the case of *Cook v. Berlin W. M. Co.* 56 Wis. 643, which is at all in conflict with this doctrine. That was a case of constructive, not actual, fraud. It seems questionable whether a trustee

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to sell lands could himself be allowed for these improvements. 2 Perry, Trusts, § 526, and cases cited.

Certain other items were allowed to *Boos* in the account, which are complained of, but which we think were correctly allowed. They are for taxes paid on the lands, for commissions paid to real-estate agents in negotiating sales, and expenses of procuring abstracts of title for lots sold. The taxes were paid for the protection of the title, and are plainly properly allowable. Failure to pay them would have been only an additional wrong on the part of *Boos*. The expenses for abstracts and commissions to agents were apparently necessary expenses in making the sales of which the appellants now receive the benefit. Had the trustee himself made the sales, he would have been entitled to credit for such expenses, and we see no good reason why *Boos* should not be so credited.

3. The appellants claim that *Boos* and *Vogel* should be charged with not less than $70,000 for damages caused by their mismanagement in handling the property. On this point we shall only say that we are satisfied that the claim was properly disallowed by the trial court.

The appeal of the defendant *Munkwitz* presents but a single question. The referee found that *Munkwitz* had in his possession $5,956.58 on account of *Boos'* one-third interest in the lands deeded to *Munkwitz*, and charged *Munkwitz* with simple interest on that sum from the commencement of the suit until September 19, 1890, when Johnston was appointed trustee, at which time *Munkwitz* was ready and offered to pay said money over to Johnston. The amount of this interest is $1,133.23. The referee's finding was confirmed by the court, and judgment rendered against *Munkwitz* for the amount. We see no error in this charge. The money belonged to the trust estate. The commencement of the action was in effect a demand for it. Both claimants were parties to the action. *Mr. Munkwitz* might

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undoubtedly have protected himself, and at the same time placed the money where it might earn interest for its rightful owner, by bringing it into court for the benefit of whichever party should finally be adjudged to be the owner of it.

No other points reqnire attention.

By the Court.— Upon the appeal of *Munkwitz*, the judgment is affirmed, with costs; upon the appeal of the *cestuis que trustent*, that part of the judgment which allows credits for improvements upon the lands is reversed, and in all other respects the judgment is affirmed, with costs to be taxed in favor of the *cestuis que trustent* against *Boos*, *Vogel*, and *Tesch;* and the action is remanded with directions to modify the judgment as indicated in this opinion and enter final judgment in accordance herewith.

A motion for a rehearing was denied October 2, 1894.

JACKSON, Respondent, vs. WISCONSIN TELEPHONE COMPANY, Appellant.

September 4 — October 2, 1894.

(1-3) *Negligence: Proximate cause: Fire caused by lightning: Disused telephone wire: "Act of God:" Court and jury.* (4) *Instructions to jury.* (5) *Costs in supreme court: Printing.*

1. Upon a plateau about eighty feet above the surrounding country stood plaintiff's barn and another building, about 325 feet apart, each having on its top a flagpole twenty to thirty feet high. A telephone company had left a wire attached to the pole on the other building and running thence to the roof of the barn. During a storm the other building was struck by lightning, and a few minutes — or seconds — later flames broke out on the roof of the barn, and it was destroyed. The evidence showed that the barn was fired by lightning, and tended to show that there was but one flash or

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stroke; that the flagpole on the other building was shattered down to about the place where the wire was attached, but the building was otherwise uninjured; and that the flagpole on the barn was not damaged by the lightning. *Held*, that the evidence sustained a verdict to the effect that the negligence of the telephone company in leaving the wire in that condition was the proximate cause of the burning of the barn. It cannot be said, as matter of law, that it was entirely improbable that the other building, situated as it was, should be struck by lightning; and the verdict finding that the bolt which struck that building was the same bolt which fired the barn cannot be said to be based on mere conjecture. NEWMAN and PINNEY, JJ., dissent, being of opinion that the neglect of the company to remove the wire, if a cause of the loss, was a remote cause.

2. The question whether it was possible or probable that the lightning striking the other building would be conducted over the telephone wire so as to set fire to the barn more than 300 feet away, was properly a question for the jury on the evidence, including the opinions of experts.
3. The telephone company cannot escape liability for its negligence on the ground that the stroke of lightning was "an act of God."
4. It is not error to refuse to give special instructions which are substantially given in the general charge.
5. Respondent's brief of 147 pages being unjustifiably long, he is allowed therefor, in the taxation of costs, the expense of printing forty pages only.

APPEAL from the Circuit Court for *Chippewa* County.

This action is brought to recover damages for a barn and its contents, burned, as plaintiff claims, by reason of defendant's negligence. Near the city of Eau Claire there is a plateau about eighty feet above the level of the surrounding country. In August, 1889, two large frame buildings, about 325 feet distant from each other, stood upon this plateau, one being a county fair building known as Floral Hall, and the other being the barn of the plaintiff. These buildings were about the same height, and upon the top or ridge of each there stood a flagpole or mast twenty to thirty feet in height. Prior to the year 1888 the defendant had constructed a telephone line from the highway

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running past the fair grounds. In September, 1888, the defendant placed a telephone in Floral Hall, and connected it with No. 12 wire with its telephone line on the highway. This connecting wire ran from the highway first to the flagpole upon plaintiff's barn, and was there tied to the pole; from thence it ran directly to Floral Hall. There was a dispute as to the place where this wire was fastened to Floral Hall, the plaintiff's witnesses testifying that it was fastened directly to the flagstaff upon Floral Hall, a foot or so above the roof, while the defendant's witnesses claim that it was attached to nails on the side of the building. The plaintiff gave no permission to attach the wire to his barn, and testified that he had no knowledge that it was so attached. A ground wire from the telephone in the interior of Floral Hall ran up to the flagstaff, and thence a distance of about 376 feet to the ground, where it was attached to an iron water pipe. Some time in the fall of 1888 the defendant took out the telephone from Floral Hall, together with the insulated wire in the interior of the building. The ground wire was left intact, and so was the wire from Floral Hall to the barn. The wire from the highway to *Jackson's* barn was taken down, but it was claimed by the plaintiff's witnesses that a considerable piece of said wire at the barn end thereof was left resting upon the roof of the barn.

On the night of the 20th day of August, 1889, there was considerable rain. At about 4 o'clock in the morning there was a flash of lightning, which was described by the witnesses as a blinding flash, and which was thought by them to have descended upon Floral Hall. In a few minutes the roof of plaintiff's barn was in flames, and the barn and its contents were destroyed. Two men were sleeping in a shed or building upon the fair ground, and they immediately went to the barn, and testify that the flagpole upon Floral Hall was completely shattered, while the flagpole

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upon the barn was untouched. The plaintiff's claim is that the lightning struck Floral Hall, and was conducted by the wire to plaintiff's barn, and set it on fire, and that the defendant was negligent in leaving the wire thus attached to the barn. Much expert evidence was adduced on both sides as to the probability of lightning passing over such a wire and destroying the barn. A motion for nonsuit was overruled, as was also a motion to direct a verdict for defendant.

The jury returned a special verdict, finding: *First*, that the defendant connected the plaintiff's barn with Floral Hall by means of a telephone wire attached to the flagstaff of the barn and to the flagstaff on Floral Hall, without any intermediate attachment; *second*, that defendant left the wire so located on the plaintiff's barn that a portion of the same rested on the roof; *third*, that the barn was thereby subjected to danger of being destroyed by fire caused by lightning electricity passing over such wire from Floral Hall to the barn; *fourth*, that the fire was caused by lightning electricity so passing over said wire; *fifth*, that in so leaving the barn connected with Floral Hall the defendant's servants were guilty of want of ordinary care; *sixth*, that such want of ordinary care was the proximate cause of the fire; *seventh*, that this result was one which a person reasonably well skilled in the defendant's business might reasonably have expected would probably occur; *eighth*, that the plaintiff did not give defendant permission to attach the wire to his barn; *ninth*, that plaintiff did not know, before the fire, that his barn was connected with Floral Hall by the wire; *tenth*, that he did not know of the danger before the fire; *eleventh*, that the plaintiff's damages were $9,258. From judgment for the plaintiff upon this verdict the defendant appeals.

For the appellant there was a brief by *Miller, Noyes & Miller*, attorneys, and *V. W. James*, of counsel, and oral

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argument by *B. K. Miller* and *Geo. H. Noyes.* They contended, *inter alia*, that the proximate cause is the cause which led to, and which might have been expected to be directly instrumental in producing, the result. *State v. Manchester & L. R. Co.* 52 N. H. 552; *Topsham v. Lisbon*, 65 Me. 449; *Ins. Co. v. Boon*, 95 U. S. 117. In other words, the injury must be the natural and probable consequence of the negligence. *Hoag v. L. S. & M. S. R. Co.* 85 Pa. St. 293; *Penn R. Co. v. Kerr*, 62 id. 353; *West Mahanoy v. Watson*, 116 id. 344; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469; *Putnam v. B. & S. A. R. Co.* 55 N. Y. 108; *Sharp v. Powell*, L. R. 7 C. P. Cas. 253; Addison, Torts (B. & Bro. ed.), 6; Cooley, Torts, 69. Liability depends upon the fact that the consequence of the act was "such as under the surrounding circumstances might and ought to have been foreseen by the wrong-doer as likely to flow from his act." *Penn. R. Co. v. Hope*, 80 Pa. St. 373; *Atchison, T. & S. F. R. Co. v. Stanford*, 12 Kan. 354; *Poeppers v. M., K. & T. R. Co.* 67 Mo. 715; *Maher v. W. & St. P. R. Co.* 31 Minn. 401; *Morrison v. Davis*, 20 Pa. St. 171; *Lynch v. Knight*, 9 H. L. Cas. 577; *Crater v. Binninger*, 33 N. J. Law, 513; *McGrew v. Stone*, 53 Pa. St. 436; *Henry v. So. Pac. R. Co.* 50 Cal. 176; *Doggett v. R. & D. R. Co.* 78 N. C. 305; *Stanley v. U. D. R. Co.* 114 Mo. 606; *Weick v. Lander*, 75 Ill. 93; *Daniels v. Ballantine*, 23 Ohio St. 532; *Fent v. T., P. & W. R. Co.* 59 Ill. 349; *Greenland v. Chaplin*, 5 Exch. 243; *Atkinson v. Goodrich Transp. Co.* 60 Wis. 141. The defendant may have been negligent and the plaintiff may have suffered an injury, but the latter must fail in his action unless the connection between the negligence and the injury can be made out. *Adkins v. A. & C. A. R. Co.* 27 S. C. 71; *Daniel v. Metropolitan R. Co.* L. R. 3 C. P. 215; *Williams v. G. W. R. Co.* L. R. 9 Exch. Cas. 157; *Holmes v. Fond du Lac*, 42 Wis. 282; *Sharp v. Powell*, L. R. 7 C. P. Cas. 253; Pollock, Torts, 43; *Regina v. Bennett*, 4 Jur. (N. S.), 1088; *Vedder v.*

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Hildreth, 2 Wis. 429; *Ward v. M. & St. P. R. Co.* 29 id. 144; *Harris v. Cameron*, 81 id. 239. The act complained of was the act of God. *Blyth v. Birmingham W. Co.* 11 Exch. 781; *Blythe v. D. & R. G. R. Co.* 15 Colo. 333; *Baltimore & O. R. Co. v. Sulphur Spring Ind. S. Dist.* 96 Pa. St. 65; *Knoll v. Light*, 76 id. 268; *Flori v. St. Louis*, 69 Mo. 341; *Borchardt v. Wausau B. Co.* 54 Wis. 107; *Mich. Cent. R. Co. v. Burrows*, 33 Mich. 6; *Long v. Penn. R. Co.* 147 Pa. St. 343.

For the respondent there was a brief by *H. H. Hayden* and *T. F. Frawley*, attorneys, and *W. H. Stafford*, of counsel, and oral argument by *Mr. Frawley*. They argued, among other things, that the fact that a natural cause contributed to produce the injury which would not have happened without the unlawful act of the defendant, does not make it an act of God and excuse the defendant. 2 Thomp. Neg. 1067; Whart. Neg. § 86; *Lord Bailiff v. Corp. of Trinity House*, L. R. 5 Exch. 204; *Ellet v. St. Louis, K. C. & N. R. Co.* 12 Am. & Eng. R. Cas. 183; *Piedmont & C. R. Co. v. McKenzie*, 75 Md. 458; *Polack v. Pioche*, 35 Cal. 416, and cases cited; *Chidester v. Consolidated D. Co.* 59 id. 197; *Rodgers v. C. P. R. Co.* 67 id. 607; *Southwestern T. & T. Co. v. Robinson*, 50 Fed. Rep. 810; *Dickinson v. Boyle*, 17 Pick. 78; *Salsbury v. Herchenroder*, 106 Mass. 458; *George v. Fiske*, 32 N. H. 32; *McArthur v. Sears*, 21 Wend. 196; *Pittsburgh v. Grier*, 22 Pa. St. 54; *Scott v. Hunter*, 46 id. 192; *Livezey v. Phila.* 64 id. 106; *Baltimore & O. R. Co. v. Sulphur Spring Ind. S. Dist.* 96 id. 65; *Couts v. Neer*, 70 Tex. 468; *Gleason v. Va. M. R. Co.* 140 U. S. 435. The act of the defendant was the proximate cause of the plaintiff's loss. Whart. Neg. § 2; Shearm. & Redf. Neg. §§ 29, 30; *Burrows v. M. G. & C. Co.* L. R. 5 Exch. Cas. 57; *Smith v. L. & S. W. R. Co.* L. R. 6 C. P. Cas. 21; *Sub-Marine Tel. Co. v. Dickson*, 15 C. B. (N. S.), 759; *Scott v. Shepherd*, 2 W. Bl. 892; *Lynch v. Nurdin*, 41 Eng. C. L. 422; *Former v.*

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Geldmecher, 13 Rep. 790; *Vaughn v. Menlove*, 32 Eng. C. L. 613; *Baltimore C. P. R. Co. v. Kemp*, 18 Am. & Eng. R. Cas. 231; *Powell v. Deveney*, 3 Cush. 300; *Higgins v. Dewey*, 107 Mass. 494; *Metallic C. Casting Co. v. Fitchburg R. Co.* 109 id. 277; *Beauchamp v. Saginaw M. Co.* 50 Mich. 163; *Griggs v. Fleckenstein*, 14 Minn. 81; *Johnson v. C., M. & St. P. R. Co.* 31 id. 57; *Ehrgott v. N. Y.* 96 N. Y. 264; *Lowery v. Manhattan R. Co.* 99 id. 158; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469; *Kellogg v. C. & N. W. R. Co.* 26 Wis. 223; *Brown v. C., M. & St. P. R. Co.* 54 id. 342; *Atkinson v. Goodrich Transp. Co.* 60 id. 141; *Fowler v. C. & N. W. R. Co.* 61 id. 159. The proximate cause of an injury is ordinarily for the jury. It is not a question of science or legal knowledge. It is to be determined as a fact in view of all the circumstances of fact attending it. *Vaughan v. T. V. R. Co.* 3 Hurl. & N. 743; *Smith v. L. & S. W. R. Co.* L. R. 5 C. P. Cas. 98; *Collins v. Middle L. Comm'rs*, L. R. 4 C. P. Cas. 279; *Romney Marsh v. Trinity House*, L. R. 5 Exch. Cas. 204; *S. C.* L. R. 7 Exch. Cas. 247; *Sneesby v. L. & Y. R. Co.* L. R. 9 Q. B. Cas. 263; *Byrne v. Wilson*, 15 Ir. Com. Law, 332; *The George & Richard*, L. R. 3 Ad. & Ecc. 466; *Jones v. Boyce*, 1 Stark. 493; *Butler v. Wildman*, 3 Barn. & Ald. 398; *Vandenburg v. Truax*, 4 Denio, 464; *Fent v. T. P. & W. R. Co.* 59 Ill. 349; *Marcy v. Merchants' M. Ins. Co.* 19 La. Ann. 388; *Perley v. Eastern R. Co.* 98 Mass. 414; *Lund v. Tyngsboro*, 11 Cush. 563; *Higgins v. Dewey*, 107 Mass. 494; *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115, 141; *Brady v. N. W. Ins. Co.* 11 Mich. 425; *Hoyt v. Jeffers*, 30 id. 181; *Barton v. Home Ins. Co.* 42 Mo. 156; *Kuhn v. Jewett*, 32 N. J. Eq. 647; *St. John v. Am. M. F. & M. Ins. Co.* 11 N. Y. 519; *Ins. Co. v. Tweed*, 7 Wall. 44; *Kellogg v. M. & St. P. R. Co.* 94 U. S. 469; *Ins. Co. v. Boon*, 95 id. 117; *Kellogg v. C. & N. W. R. Co.* 26 Wis. 223; *Brown v. C., M. & St. P. R. Co.* 54 id. 342; *Atkinson v. Goodrich Transp. Co.* 60 id. 141;

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Kreuziger v. C. & N. W. R. Co. 73 id. 158; *Spaulding v. Sherman*, 75 id. 77; *Baltzer v. C., M. & N. R. Co.* 83 id. 459.

WINSLOW, J. It was strenuously and ably argued by the appellant's counsel that the evidence did not show that the negligent act of defendant was the proximate cause of the burning of plaintiff's barn. The rule is well settled in this state that, in order to render a negligent act the proximate cause of an injury, it must appear "that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." *Atkinson v. Goodrich Transp. Co.* 60 Wis. 141, 156; *Marvin v. C., M. & St. P. R. Co.* 79 Wis. 140. The jury found all the elements necessary to constitute the negligent act of the defendant the proximate cause of the burning of the barn within this rule, and the question is whether the evidence justifies such finding. It is said that the striking of a building by lightning is a very infrequent occurrence, and that it could not be reasonably anticipated by any one. It is true that the number of buildings which are struck by lightning, as compared with the whole number of buildings in any given locality, is very small; but this fact by no means seems to us to be the final or controlling test of the question of probability. In this case there was a building situated upon a high plateau from eighty to ninety feet above the level of the surrounding country, with a flagpole upon the roof about twenty-five feet in height. Now, there are some facts of common knowledge known to every reasonable person who has passed the age of childhood. Among these facts are that in this latitude there are at certain seasons of the year frequent and violent thunderstorms; that at such times the clouds are heavily charged with electricity, which constantly finds its way to the earth in what we call

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strokes of lightning; that these lightning strokes, in the great majority of cases, strike prominent objects, such as trees, poles, and high buildings, and follow them to the ground; that fire is frequently the result of such strokes. These facts are well known to all persons, and no proof of them by expert evidence is necessary. Can we say, as matter of law, in view of these well-known facts, that it was entirely improbable that a building situated, as Floral Hall was, upon the highest ground in the vicinity, with a flagpole upon it, should be struck by a discharge of lightning, simply because many buildings in such situations escape the stroke for years? We think not.

But it is said that it was simply a matter of conjecture whether the bolt which struck Floral Hall and shattered the flagpole was the bolt which set the fire, or whether the barn was fired by an independent stroke of lightning descending upon the barn at or about the same time that Floral Hall was struck. In considering this question, reference to the evidence is necessary. The evidence seems very conclusive that the barn was fired by a stroke of lightning, and that Floral Hall was struck by lightning and its flagpole shattered a very few minutes — perhaps only seconds — before the blaze broke out on the roof of the barn. These two facts are not open to doubt under the evidence. There were two witnesses sleeping in buildings on the fair grounds within a few hundred feet of the hall. Both testify that they were awake and saw the flash of lightning, and that it was right in the direction of Floral Hall. They immediately went out, found the barn burning and the flagpole on Floral Hall shattered, while the flagpole on the barn was uninjured. These witnesses, as well as several others who claim to have seen the flash, say that there was but one flash, one report, one "straight streak of lightning," "like a streak of hot iron." There was also evidence that the flagpole was only shattered down to about the place

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where the wire leading to the barn was fastened, and that the ground wire, which seems to have been attached to the flagpole just below the barn wire, was burned for a distance of four or five feet from the pole. No damage was done to Floral Hall beyond the shattering of the pole. If these facts were all true, it would seem that they pointed pretty satisfactorily to the conclusion that the bolt which struck Floral Hall was the same bolt which fired the barn. Certainly a verdict to that effect, based on evidence establishing these facts, could not be said to be based on conjecture.

It is, however, argued that it is entirely improbable, if not well-nigh impossible, that a bolt of lightning striking one building would be conducted by a telephone wire over a span of 300 feet to another building, at least in sufficient quantity to fire the second building. This raises a scientific question, necessarily depending largely upon the opinions of expert witnesses. A considerable number of such witnesses were examined on both sides. The experts called by the plaintiff testified that if the loose end of the wire was left resting on the roof of the barn, and the roof and sides were wet with rain, the wire and wet barn would form a relatively good conductor of electricity; that such a wire would carry sufficient electricity to start a fire, and would form, under the circumstances, a good path to the ground; that a part, at least, of the bolt would probably follow this path to the ground; and that all these facts have been known for years, and the danger to the barn resulting therefrom was reasonably to be anticipated. On the other hand, an equal number of experts upon the other side were of opinion that it would be very improbable, if not impossible, for such a wire, under the circumstances, to carry sufficient lightning to set the barn on fire, and that the lightning would undoubtedly seek some shorter path to the earth. We cannot undertake to compare and decide which class of experts were the best qualified to speak au-

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thoritatively upon this scientific question. They all qualified themselves so as to make their testimony admissible as expert evidence. Nor can we undertake to decide this question of science ourselves. It was properly a question for the jury after having heard the circumstances of the case and the opinions of the experts, and we cannot say that the jury have decided wrongly upon the question.

The further argument is made that the stroke of lightning was the "act of God," for which no one is responsible. Certainly a stroke of lightning is an "act of God;" but that is not the question here presented, or rather another element — i. e. the negligence of man — is added to the question, which materially alters its scope. If I, owning a high mast or building, which I know is so situated as to be very likely to be struck by lightning, construct an attractive path for the lightning to my neighbor's roof, so that his house is destroyed by a bolt which strikes my mast or building, shall I escape liability for my negligent or wrongful act by pleading that the lightning was the act of God? Certainly not. I invited the stroke of one of the most destructive powers of nature, and negligently turned its course to my neighbor's property. The principle is the same as that involved in the case of *Borchardt v. Wausau Boom Co.* 54 Wis. 107. The lightning stroke is in no greater degree the act of God than the usual freshets occurring in a river.

Our conclusion is that the court properly refused to grant a nonsuit, and also properly refused to direct a verdict for the defendant.

Two instructions were asked by the defendant and refused by the court, as follows: "No default, negligence, or want of care on the part of the defendant can be presumed, but it is for the plaintiff to satisfy (you) by a fair preponderance of the credible testimony that the defendant was negligent, and, unless the evidence shall satisfy you,

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you must find that there was no negligence on the defendant's part." "If, in your opinion, any witness has testified falsely as to any one material fact, then you are at liberty to disregard any other uncorroborated testimony given by such witness." As to the first of these instructions, it was substantially given by the court in the general charge in far stronger terms than it was asked by the appellant. Substantially the same remarks apply to the second instruction asked. The jury were most fully and carefully instructed as to their duty in weighing and judging of the credibility of witnesses, and, though the language of the instruction was not given, it is not seen how the instruction asked could have added anything to the unusually careful and clear cautions which were given them by the court.

A question is raised as to the form of certain questions put to the plaintiff's experts. We have examined them and find no error.

The respondent's brief contains 147 pages. There is no justification for so long a brief in this case. It is an abuse of the privilege of counsel, and a hindrance, rather than an aid, to the court. All the questions in the case could be fully discussed in less than one third the space. In taxing costs the clerk will only allow the respondent for his brief the expense of printing forty pages.

By the Court.—Judgment affirmed.

NEWMAN, J. The cause of damages is proximate only when it might reasonably have been expected by a man of ordinary intelligence and prudence that such damages would result from that cause. *Atkinson v. Goodrich Transp. Co.* 60 Wis. 141. The damages, as a consequence of the negligent act or omission, must be both natural and probable. *Barton v. Pepin Co. Agr. Society*, 83 Wis. 19. It cannot be said of any particular building that it is probable that

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it will be struck by lightning. The chances are very largely against it. It could not have been foreseen as likely to happen that either Floral Hall or the plaintiff's barn would be struck by lightning. That might be, in the course of nature, but could not be anticipated as probable. The neglect of the defendant to remove the wire did not increase the danger or probability that either building would be struck. At most, it only rendered it possible that, in case either was struck, fire might be communicated to the other. It could not be the cause of either building being struck. It was a condition, rather than the cause, of the damages. If a cause at all, it was a remote cause.

PINNEY, J. I concur in the foregoing opinion by Mr. Justice NEWMAN.

THE STATE EX REL. DE PUY VS. EVANS.

September 4 — October 2, 1894.

Criminal law and practice: Complaint and warrant: Change of venue: Writ of prohibition.

1. A criminal complaint, subscribed and sworn to before a magistrate and purporting to have been made after the complainant had been duly sworn, will be regarded as a sufficient examination of the complainant on oath, under sec. 4776, R. S.
2. Under sec. 4809, R. S. (providing that if a person brought before a magistrate for examination shall make oath of prejudice the magistrate "shall transmit all the papers in the case to the nearest justice or other magistrate, qualified by law to conduct the examination"), the question whether the nearest justice or other magistrate is so qualified must be summarily determined by the magistrate before whom the oath of prejudice is made, and his determination is conclusive.
3. A warrant for the arrest of a person accused of a crime is insufficient if it fails to state any town, village, city, or county in which the alleged offense was committed or the proceedings instituted. A reference to "said county" is unavailing if no county is mentioned.

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4. A writ of prohibition will not issue to restrain a justice of the peace from proceeding with a preliminary examination, merely because of a defect in the warrant of arrest or because of an alleged former jeopardy of punishment, the ordinary legal remedies being adequate.

APPLICATION for a Writ of Prohibition.

This is an original application to this court for a writ of prohibition. The facts alleged in the relator's verified petition, filed herein July 18, 1894, and in the return, are as follows:

On February 17, 1893, a complaint upon information and belief was made by one Charles G. Deissner before the defendant as justice of the peace, charging the relator with having on October 17, 1892, at the county of Waukesha, committed the crime of adultery with his niece, Helen May De Puy. Thereupon said justice forthwith issued his warrant for the arrest of the relator, and he was thereon arrested, February 18, 1893, and brought before said justice for examination. The justice refused to dismiss said proceedings for want of jurisdiction. A full examination of the relator was had on the part of the state before him, whereupon, and on March 13, 1893, the said magistrate did adjudge that the offense had been committed, and that there was probable cause to believe the relator guilty, and did bind him over to the circuit court of Waukesha county for trial, and fixed his bail at $4,000, which was given by the relator. Thereupon said magistrate certified a full return of the proceedings and of his said examination to the circuit court, together with the stenographer's transcript of all the testimony, and the same was filed in said circuit court May 20, 1893. On May 23, 1893, the district attorney filed in said circuit court his information in said action, in the ordinary form, and on May 24, 1893, the relator was arraigned in said circuit court upon said information, and entered his plea of not guilty. On May 24, 1894, a jury was

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duly impaneled and sworn in said court to try him for said offense. The district attorney fully opened and stated his case to said jury, and called a witness on behalf of the state, who was sworn therein. The court thereupon sustained an objection to any evidence on the ground that the information did not charge an offense, and discharged the relator from custody.

Thereafter, and on said May 24, 1894, another complaint was made in writing and on oath by one Mabel Dougherty, before one T. W. Parkinson, a justice in and for said Waukesha county, charging the relator with the same identical offense at the same time and place as charged in said previous complaint, warrant, and information. A warrant was thereupon issued by said magistrate, and the relator was again arrested, May 24, 1894, and brought before said magistrate for another examination. The action was then removed to A. J. Dopp, the nearest magistrate qualified by law. Such proceedings were had therein that July 6, 1894, the cause was dismissed for want of jurisdiction, and the relator was discharged by Justice Dopp.

On July 12, 1894, another complaint was made by said Mabel Dougherty before one George M. S. Jewett, a justice in and for said county of Waukesha, in the words and figures following, to wit:

"State of Wisconsin, County of Waukesha — ss: *The State of Wisconsin against Edwin M. De Puy.* Mabel L. Dougherty, being duly sworn, says that on the 17th day of October, in the year 1892, at said county, *Edwin M. De Puy* did then and there have sexual intercourse with one Helen May De Puy, a female, said Helen May De Puy then and there being the daughter of William H. De Puy, who was and is a brother of said *Edwin M. De Puy*, and did then and there have incestuous sexual connection and intercourse with said Helen May De Puy, daughter of said

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brother of said *Edwin M. De Puy*, against the peace and dignity of the state of Wisconsin. MABEL DOUGHERTY.

"Subscribed and sworn to before me this 12th day of July, 1894. GEO. M. S. JEWETT, Justice of the Peace."

Said last-named magistrate thereupon issued his warrant upon said complaint, in the ordinary form, except as mentioned in the opinion. Upon said warrant the relator was again arrested, July 12, 1894, and brought before said last-named magistrate for another examination. The relator thereupon made the statutory oath of prejudice of said magistrate, whereupon said magistrate, Jewett, notwithstanding Justice Kimball was the next nearest justice of the peace, certified all the papers in said action to the defendant herein, as the next nearest justice qualified by law to hold said examination. Upon being brought before said justice *E. J. Evans*, and an objection to the jurisdiction having been overruled, the relator filed with the defendant his plea, in writing, of former jeopardy and acquittal of said charge, together with former examination, and all proceedings against the relator before the various magistrates and courts for the offense charged. The defendant in all things overruled said plea and objection, and said second examination was by him ordered to proceed before him, and the relator was by him, the said *E. J. Evans*, recognized to appear before him for such examination.

Thereupon the relator filed in this court his verified petition, reciting at length and in detail the foregoing proceedings, and obtained from this court the alternative writ of prohibition, which was duly served upon the defendant herein. To said writ the defendant returned under oath, in effect, a reiteration of the facts stated. To that return the relator demurred on the ground that the same did not constitute a defense.

For the relator there was a brief by *D. S. Tullar* and

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Ryan & Merton, and oral argument by *Mr. Tullar* and *E. Merton*. They contended, *inter alia*, that the writ should be made absolute because: (1) There has been one preliminary examination, at the close of which the defendant was bound over for trial; and under the statutes of this state there can be but one preliminary examination. (2) The defendant has been put upon trial before a jury upon a valid information and acquitted, and therefore cannot be examined again for the same offense. (3) Justice *Evans* has no jurisdiction to hold an examination because he was not the nearest justice, and the papers should not have been sent to him by Justice Jewett. That the writ will lie, see *People ex rel. Mayor v. Nichols*, 79 N. Y. 591; *Quimbo Appo v. People*, 20 id. 540; *Hayne v. Justice's Court*, 82 Cal. 284; 2 Spelling, Extr. Relief, § 1731.

C. E. Armin and the *Attorney General*, for the respondent.

CASSODAY, J. In this state marriage "between parties who are nearer of kin than first cousins, computed by the rule of the civil law, whether of the half or of the whole blood," is expressly forbidden. R. S. sec. 2330. Such a marriage, "if solemnized within this state," is "absolutely void without any judgment of divorce or other legal proceeding." R. S. sec. 2349. The statute, moreover, declares that: "Any person being within the degree of consanguinity within which marriages are prohibited or declared by law to be incestuous and void, . . . who shall commit adultery or fornication with each other, shall be punished by imprisonment in the state prison not more than ten years, nor less than two years." R. S. sec. 4582. Of course the justice of the peace had no jurisdiction to hear, try, and determine the guilt or innocence of the accused for such a crime. R. S. sec. 4739. But he did have jurisdiction, upon proper complaint being made, to issue his warrant in proper

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form and cause the accused to be brought before him, and to examine into the matter so charged, and if he found upon such examination that the offense charged had been committed, and that there was probable cause to believe the prisoner guilty, then to hold him to bail or commit him for trial. R. S. secs. 4775-4792.

The complaint upon which the relator was last arrested was subscribed and sworn to by the complainant before Justice Jewett, and is set forth in the foregoing statement. It purports to have been made after the complainant had been duly sworn, and hence must be regarded as a sufficient examination of the complainant on oath to satisfy the statute. *State v. Nerbovig*, 33 Minn. 480; *State v. Davie*, 62 Wis. 305. It contains a substantial statement of the offense, in positive terms, and that seems to be sufficient. *Ford v. State*, 3 Pin. 449; *Gallagher v. State*, 26 Wis. 423. That complaint, therefore, gave to Justice Jewett jurisdiction to issue a warrant and cause the relator to be arrested and brought before him, and to examine whether the offense charged had been committed, and, if so, whether there was probable cause to believe the accused was guilty. He did issue a warrant and cause the relator to be brought before him for examination; and thereupon the relator made the statutory oath of prejudice, and demanded a change of venue, and the same was granted by sending the same to the defendant, as mentioned. It is claimed that the defendant, as justice, never got jurisdiction of the cause, because there was another justice of the peace having an office nearer to Justice Jewett than the defendant. But the statute did not require Justice Jewett to send the cause to the nearest justice, but only to "transmit all the papers in the case to the nearest justice or other magistrate, *qualified by law to conduct the examination*." R. S. sec. 4809. This clearly implies that the cause is not to be sent to any justice or other magistrate who is disqualified by law to

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conduct such examination, even though he be the nearest. Manifestly the question whether such "nearest justice or other magistrate" is so qualified or disqualified must be summarily determined by some one. We have no doubt that it must be determined by the justice or other magistrate before whom such oath of prejudice is so filed; that is to say, in this case, by Justice Jewett. He necessarily did so determine that question in this case after hearing evidence pro and con. The authority to so determine includes the possibility of making a wrong determination. Nevertheless we must, upon the repeated decisions of this and other courts, hold that such determination of the justice or other magistrate so transmitting the cause is conclusive upon the parties and the justice or other magistrate to whom the cause is sent. *Martin v. State*, 79 Wis. 173; *State v. Sorenson*, 84 Wis. 31.

The jurisdiction thus acquired by Justice Jewett by virtue of the complaint so made before him was successfully invoked in favor of the relator by the filing of his oath of prejudice as mentioned. Upon the filing of such oath and the transmission of the papers, such jurisdiction was necessarily transmitted to and vested in the defendant, as such justice of the peace. The exercise of the jurisdiction so vested in the defendant was thereupon invoked by the relator's asking the defendant, as such justice, to dismiss the proceeding on the ground that he had previously been put in jeopardy of punishment for the same offense, and upon the further ground that the cause should have been sent to Justice Kimball, instead of the defendant; but the defendant, as such justice, refused to dismiss upon either of those grounds.

The question whether the warrant issued by Justice Jewett was sufficient in form and substance to authorize the arrest of the relator and the holding of him in custody, is entirely a different question. It is a question which

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might have been properly submitted to and passed upon by either Justice Jewett or the defendant. If what purports to be a copy of the warrant, before us, is correct, then the warrant was certainly defective. It nowhere mentions any town, village, city, or county in which the alleged offense was committed or the proceeding instituted. The statute requires the warrant to recite "the substance of the accusation and requiring the officer to whom it shall be directed forthwith to take the person accused and bring him before the said magistrate or before some other magistrate of the *county*, to be dealt with according to law." R. S. sec. 4776. The statute does not require the complaint to be attached to or accompany the warrant, but the sheriff or other officer receives the warrant alone to be executed. The words "said county," in the warrant in question, are without significance, since no county is therein mentioned.

The questions recur whether a writ of prohibition should be granted by reason of such defect in the warrant, or such alleged former jeopardy of punishment. This court has repeatedly held that a writ of prohibition will not be granted where there is any other adequate legal remedy. *State ex rel. Rogers v. Burton*, 11 Wis. 57; *State ex rel. Dilworth v. Braun*, 31 Wis. 606; *In re Radl*, 86 Wis. 645, and cases there cited; High, Extr. Leg. Rem. § 770. In the case last cited this court refused to grant such writ to restrain a mere *de facto* justice of the peace from trying and determining a criminal case pending before him. In the *Dilworth Case* cited, the writ was refused because the relator had an adequate remedy by other ordinary legal proceeding, to wit, by proving in the same action the former judgment in bar. For the defect in the warrant, mentioned, the relator certainly had numerous other adequate remedies. To allow such writ in such a case is to sanction its allowance in every case where the warrant is void upon its face, or where the complaint, information, or indictment is insuffi-

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cient. That would be a complete revolution in criminal procedure. So this court has repeatedly held that under our statutes such writ issues only to restrain the acts of a court or other inferior tribunal exercising some judicial power *which it has no legal authority to exercise at all.* R. S. secs. 3457–3462; *State ex rel. Kellogg v. Gary*, 33 Wis. 93; *In re Radl*, 86 Wis. 645. In *State ex rel. Long v. Keyes*, 75 Wis. 288, the writ was invoked on the ground that the municipal judge was, without legal authority, exercising the inquisitorial function vested only in a grand jury, but the court held otherwise. In that case the present chief justice, speaking for the court, said: "The writ lies only to restrain the exercise of judicial functions *outside or beyond his* [the municipal judge's] *jurisdiction in the matter.*" 75 Wis. 298. The principles applicable are well stated by a late text writer: "A writ of prohibition is an extraordinary writ issuing out of a court of superior jurisdiction, and directed to an inferior court, commanding it to cease entertaining jurisdiction in a cause or proceeding *over which it has no control*, or where such inferior tribunal assumes to entertain a cause over which it has jurisdiction, *but goes beyond its legitimate powers, and transgresses the bounds prescribed to it by law.* . . . It should be issued only in cases of extreme necessity, and not for grievances which may be redressed by ordinary proceedings at law or in equity; and it is not demandable as a matter of right, but of sound judicial discretion, to be granted or withheld according to the circumstances of each particular case. . . . It is the means by which the superior court exercises its supervisory power over the inferior court, and keeps it within the limits of its rightful jurisdiction." 19 Am. & Eng. Ency. of Law, 263. To the same effect, High, Extr. Leg. Rem. (2d ed.), §§ 762, 763, 765, 781. It is collateral to and independent of the action or proceeding sought to be prohibited, and is to prevent further prosecution of the

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same by a judicial tribunal having no jurisdiction thereof. *Ibid.* A writ of prohibition is not to perform the office of a writ of error. Its purpose is to prevent the inferior tribunal from assuming a jurisdiction not legally vested in it, or from exceeding its lawful authority. *State ex rel. Dawson v. St. Louis Court of Appeals*, 99 Mo. 216; *Alderton v. Archer*, L. R. 14 Q. B. Div. 1. Where the inferior tribunal has jurisdiction of the subject matter, and the defendant is duly served with process or voluntarily appears, a writ of prohibition will not be granted. *In re Cooper*, 143 U. S. 472.

If, as claimed, the relator had previously been put in jeopardy of punishment for the same offense, then that was a legitimate matter of defense in the ordinary way. A writ of prohibition is not to be resorted to where the usual and ordinary forms of remedy are sufficient to afford redress,—as by motion, trial, appeal, writ of error, *habeas corpus*, or otherwise. *State v. Nathan*, 4 Rich. Law, 513; *State ex rel. Berryhill v. Cory*, 35 Minn. 178; High, Extr. Leg. Rem. (2d ed.), § 771. Where the inferior tribunal has jurisdiction to do the act sought to be prohibited, but the manner of doing it is improper or even unauthorized, a writ of prohibition is not the remedy. *Ex parte Smith*, 23 Ala. 94; *People ex rel. Scannell v. Whitney*, 47 Cal. 584; *State ex rel. Wassell v. Judge of Fourth District Court*, 22 La. Ann. 115; *Dayton v. Paine*, 13 Minn. 493.

By the Court.—The demurrer to the return is overruled, and the alternative writ of prohibition is quashed.

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ALLEN and another, Appellants, vs. BROOKS, Respondent.

September 5 — October 2, 1894.

Vendor and purchaser of land: Contingent interest: Void devise: Setting aside deed for fraud.

A testator devised lands to the city of Superior before it was incorporated. Some of the heirs quitclaimed their interests therein, for $100 each, to the defendant, a son-in-law of their uncle, who was to contest the validity of the devise, and if successful was to pay each $300 more. Had their title been unquestioned their interests would have been worth much more, but were then not marketable. The devise was afterwards adjudged void. It appearing that the grantors were not induced to make the deed by any misrepresentation, concealment, or undue influence, that at the time they were anxious to sell, and that they knew the state of the title as well as the defendant did, and knew, also, that he depended entirely upon the contingency of success in the proposed legal proceedings to secure any interest in the lands through their deed, it is *held* that they are not entitled to have the deed set aside on the ground of fraud.

APPEAL from the Circuit Court for *Douglas* County.

The facts are sufficiently stated in the opinion. The plaintiffs appeal from a judgment in favor of the defendant.

For the appellants there was a brief by *Reed, Grace & Reed* and *John O. Winship*, and oral argument by *H. H. Grace* and *Mr. Winship*.

Champ Green, for the respondent.

ORTON, C. J. A brief statement of the facts is as follows: Peter Dean, of the city of Duluth, Minn., died on the 4th day of January, 1884, seised of the following lands, to wit: The east half of the southeast quarter of section 13, town 48, range 13 west, and the southeast quarter of section 34, town 49, range 14 west, situated in Douglas county, Wis.; also twenty lots in the city of Duluth, Minn. His sole heirs at law were his two brothers Thomas Dean and Dennis Dean;

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his sister, Mary Duryea; John J. Dean, *Sarah A. Teasdale*, and *Catherine L. Allen*, the children and sole heirs of his deceased brother John Dean; Johanna D. Hayes, Mary T. Saddler, and William Dean, the children and sole heirs of his deceased brother Alexander Dean. He left his last will and testament, which was afterwards admitted to probate, by which he bequeathed to his sister, Mrs. Mary Duryea, in copper and bank stocks and money, to the amount of $25,000, and devised to the city of Superior, Wis., the above-described eighty acres and 160 acres of land, situated at or near that place, to be used for public purposes, and to the village or city of Duluth the said lots situated therein, to be sold after one year and a half, and the proceeds thereof used by said city of Duluth for the purchase and beautifying of small parks, from five to ten acres in extent, throughout said city, for the use of the inhabitants thereof.

At the time said will was made, there was no such municipal corporation as the city of Superior in Wisconsin in existence. The heirs knew the provisions of the will, and that there was at least a question whether the bequest to the city of Superior was valid for that reason. There was, however, at the time, a community commonly called the "City of Superior" within the corporate limits of the town of Superior, which was afterwards incorporated as the city of Superior by an act of the legislature in the year 1889. If the title had been unquestionable, said real estate in Wisconsin was reasonably worth the sum of $80,000; but, as the title was then involved in doubt, it had no marketable value whatever.

The said Dennis Dean was the father-in-law of the defendant, *George L. Brooks*, and they resided near where the lands were situated. In the year 1889, the said Dennis Dean, being desirous of having proceedings instituted to test the legality of the will, called upon the said John J. Dean, who resided in Milwaukee, and who was the brother

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of the plaintiffs, and suggested to him to write to the defendant, whom he had requested to take an interest in the subject of this claim of the heirs, for the purpose of having such proceedings instituted. On the 27th day of March, 1889, the said John J. Dean, being fully authorized to act on behalf of the plaintiffs, wrote to the defendant on behalf of himself and the plaintiffs, and requested him to take the matter at once in hand and push it through, and that all the heirs would join therein, and expressed the hope that he would take it and realize something out of it for the heirs as well as for himself, and offered to settle in any way he and his uncle Dennis might arrange it. On the 8th day of April, following, the said defendant wrote to the said John J. Dean, in reply, that Dennis Dean had said something about his purchasing some interest in the property for the purpose of contesting said bequest and making arrangement to sustain the suit; that as to the value of the interests, in the present shape it is in, it is impossible to determine; that the Wisconsin land is wild, and about six miles from town, and has been platted and many of the lots sold; and that, as he had requested it, he would make him a proposition to pay $300 for his and his sisters' interest in the lands, to be conveyed by quitclaim deed, and if he perfects the title he will pay to each one $300 more, making $1,200 in all. On April 15th following, John J. Dean wrote the defendant, in reply, that his sisters (the plaintiffs) and himself agree to the proposition if he (the defendant) thinks that nothing better can be done. This is the effect of this correspondence, but not literal. John J. Dean communicated this arrangement to the plaintiffs, and thereupon the sale was consummated by their conveying to the defendant by quitclaim deed all their right, title, and interest in said Wisconsin real estate, and $200 was paid thereon to the plaintiffs; and on the 20th day of April, 1889, the defendant gave to the plaintiffs an agree-

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ment in writing in effect that, if he can and do acquire a title to the lands conveyed by them at this date by quit-claim deed, he will pay them each $300 more.

The plaintiffs tendered to the defendant the money so paid and said agreement, and demanded a reconveyance of their said interests; and, upon his refusal so to do, they commenced this action to have said deed declared void on the ground of fraud, covin, and misrepresentation.

The above facts were in effect found by the circuit court, and appear to have been established by the evidence. The false representations charged in the complaint are as follows: (1) That there was some property that belonged to Peter Dean that was not disposed of by the will, of the value of $100. (2) That he could so manage the property as to make for the heirs $300 to each, and that it was not worth more than $400. (3) That the other heirs had disposed of their interests at the same rate. (4) It is charged that the defendant knew that the will was void, and that the interest of each heir was of the value of $40,000. (5) That the defendant concealed the true state of the title and made said misrepresentations for the purpose of inducing the plaintiffs to execute the deed. (6) That the plaintiffs were ignorant of the true state of the title, and of the value of the Wisconsin lands. The learned judge of the circuit court found "that the plaintiffs intended, by the conveyance made by them to the defendant, to sell and convey to him all their right, title, and interest in the real estate in question; that they were not induced to make said deed by any fraud or trick on the part of the defendant or any other person; that they knew, when they made said conveyance to defendant, the condition of the title of said land substantially as well as the defendant; knew the conditions of said will by which the said Peter Dean attempted to bequeath said land for public purposes, and that, unless said bequests were judicially determined to be illegal and

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void, they had no interest whatever in said real estate; and they also knew that the defendant, in taking said conveyance from them, proposed instituting legal proceedings to test the validity of said will, and that he depended entirely upon the contingency of success in said proposed legal proceedings to secure any interest whatever in said lands through or under said quitclaim deed." These findings were clearly supported by the evidence.

The above correspondence and the agreement which the defendant gave the plaintiffs at the time of the execution and delivery of the deed show that the plaintiffs knew the condition of the title to their estates, as it was then, and as well as the defendant. The agreement contemplates that there might be a chance for the defendant to secure a good title by having the will declared void in respect to the Wisconsin lands, for it provides that in such a contingency he shall pay them an additional $300 each. It is true that the defendant was the son-in-law of their uncle Dennis Dean, and that he occupied towards them somewhat a position of trust and confidence, and might, therefore, the more readily influence them to sell their interests in the estate to him. But there does not appear to be any evidence that the defendant misrepresented the state of the title, or influenced them unduly to sell their interest to him, or that he concealed from them any fact that he knew himself about the estate or the condition of the title. It seems that the plaintiffs needed this ready money and were anxious to get it. The plaintiffs' brother, John J. Dean, wrote to the defendant: "If agreeable and convenient, we would like you to arrange so we could realize some of it [the money] before Easter; so the girls say." John J. Dean was their duly authorized agent to arrange the terms of the sale, and they ratified everything he did in the matter, and they executed the quitclaim deed without hesitation or objection. The parties seem to have stood on equal terms in

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relation to the bargain. John J. Dean had written the defendant: "I hope you will take it and realize something out of it for us as well as for yourself. At present it would be a Godsend. . . . I speak for *Kate* and *Sarah*, too." What the defendant did with his interest in the lands after he purchased them from the plaintiffs and other heirs has perhaps nothing to do with this case, for this action involves nothing except what occurred at the time of the sale and the conditions then present. But the court found, in effect, that the defendant and the other heirs afterwards commenced an action against the city of Superior to have the bequest of the Wisconsin lands declared void, and the circuit court adjudged it void; and, pending an appeal to this court, the matter was settled in such way that the defendant, on paying his proportion for legal services, finally received two fifteenths of two thirds of one half of the Wisconsin lands. This may tend to show, perhaps, how problematic and uncertain the interest of the plaintiffs was at the time of the sale, and the court found that such interest was not then of any marketable value. It seems to be conclusive that there was no fraud in the sale.

From the judgment of the circuit court, declaring this bequest to the city of Superior void, it may now appear that this was a hard bargain for the plaintiffs, as they knew it would be in such an event, and they provided against it by an agreement of the defendant to pay them each $300 more for their interest. But it does not appear that this was a hard bargain at the time it was made, or that the consideration was inadequate, or that it was not then perfectly fair and honest. Future eventualities of a good title and increased values cannot be considered in such a case as the grounds of avoiding the sale. Such a criterion would avoid very many *bona fide* contracts. I have specially considered but one of the findings of the circuit court, and that one disposes of the question of fraud in the procurement of

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the deed. That is the only material issue under the pleadings. The findings of the court on the facts are full, and appear to be fair and sustained by the evidence.

The learned counsel of the appellants, in the midst of the trial, made an offer to amend the complaint "to correspond with the facts." No amendment was drawn up or submitted, and the brief of the learned counsel does not suggest what specific amendment of the complaint is claimed to have been made. The gravamen of the complaint, as it stands, is that the deed was obtained by false and fraudulent representations and concealment. It is not suggested how the proposed amendment should affect or change these, as the grounds of the action. The proposed amendment is ignored in the findings of fact and conclusions of law, and is too vague and indefinite to be considered by this court. The case comes to this court as it was tried and determined in the court below, and we are governed by the record for a knowledge of case. If it is claimed that the facts in evidence support some other cause of action than that alleged in the complaint, it is elementary that such an amendment could not be made.

By the Court.— The judgment of the circuit court is affirmed.

BUGBEE, Appellant, vs. LOMBARD and another, Respondents.

September 6 — October 2, 1894.

EXECUTIONS. (1) *Levy on property in the hands of a fraudulent vendee: Justification.* (2, 3) *Issuance to another county: Docketing judgment: Evidence.*

1. Where an execution was levied on property in the hands of a third person, who claimed title thereto under a transfer from the judgment debtor, the officer and creditor attempting to justify under the writ on the ground that such transfer was fraudulent must show that they acted under a valid judgment and execution.

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2. An execution cannot be issued to a county other than that in which the judgment was rendered, until the judgment has been docketed in such other county.
3. The existence of the judgment in the county of its rendition and the issuance of an execution to another county afford no presumption that the judgment had been docketed in the latter county.

APPEAL from the Circuit Court for *Douglas* County.

This action was brought against *Lombard*, sheriff of Polk county, and the *Twohy Mercantile Company*, for the taking and converting of personal property, the plaintiff claiming title thereto by bill of sale from one Wells. The defendants justified under an execution alleged to have been issued out of the circuit court for Washburn county, to the sheriff of Polk county, upon a judgment in that court in favor of the defendant the *Twohy Mercantile Company*, against said Wells, under which it was sold; and the defendants claimed that the transfer from Wells to the plaintiff was fraudulent and void as to the creditors of the former.

Evidence was given tending to show that a levy had been made June 4, 1892, on the property in question, by the defendants, under an execution conceded to be invalid, and that this levy had been released; that on the 24th of the same month the same property was levied on under an execution issued out of the circuit court for Washburn county on the judgment mentioned in the answer. The transcript of this judgment was put in evidence, showing that it had been satisfied in part, and that execution had been issued to the sheriff of Polk county for the remainder, June 24, 1892, but the execution had been lost. The defendant *Lombard*, sheriff of Polk county, testified concerning it, in substance, that it was upon a judgment rendered in Washburn county in favor of the *Twohy Mercantile Company*, signed by the clerk for Washburn county, and under the seal of the court for that county; that he had handled several executions, and levied under them, and it appeared in

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the same manner with others; was in the usual form, and fair on its face, as far as he could see; stated the county in which the judgment was rendered; and was against said Wells. The plaintiff asked to have the evidence in respect to a levy on the property under this execution stricken out, but this was denied. There was no evidence produced to show that a transcript of the judgment had been filed and the judgment docketed in the office of the clerk of the circuit court for Polk county.

The court instructed the jury that the bill of sale was void, and directed a verdict for the plaintiff for nominal damages only, by reason of the levy of June 4th under the first and invalid execution. From a judgment on this verdict the plaintiff appealed.

For the appellant the cause was submitted on the briefs of *A. L. Bugbee.*

For the respondents there was a brief by *Ross, Dwyer & Hanitch*, and oral argument by *W. D. Dwyer.*

PINNEY, J. The action having been brought by the plaintiff claiming title to the property in question under a transfer from the defendant in the judgment and alleged execution, and as the transfer to him was sought to be impeached as having been made in fraud of creditors, it became necessary for the officer, *Lombard*, as well as the creditor, the *Twohy Mercantile Company*, to show that they acted under a valid judgment and execution. An execution fair on its face is not, in such case, of itself sufficient to protect the officer. *Bogert v. Phelps*, 14 Wis. 88. The failure to show that the judgment against Wells in the circuit court for Washburn county had been docketed in the office of the clerk of the circuit court for Polk county, to which county the execution was issued, was a fatal defect in the defense of the defendants. Execution against the property of a judgment debtor, situated in a county

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other than that in which the judgment was rendered, can only be issued after the judgment has been docketed in such other county. R. S. sec. 2971. The only authority for issuing an execution to another county is conferred by this section, and until the judgment is docketed in such county no execution can be issued to the sheriff thereon. The defect is jurisdictional. *Kentzler v. C., M. & St. P. R. Co.* 47 Wis. 641; *Smith v. Buck*, 22 Wis. 577. The fact of the existence of the judgment in the county of its rendition, and that an execution had been issued to another county, does not afford any presumption of the existence of the independent and material fact essential to its validity; namely, that the judgment had been properly docketed in such county. 2 Best, Ev. § 300; *U. S. v. Ross*, 92 U. S. 281; *Befay v. Wheeler*, 84 Wis. 142. A mere recital of such docketing, if any there had been, in the execution would not supply the defect in a case such as this, where a judgment duly docketed is indispensable to the validity of the execution and to the defense relied on. An execution fair on its face merely would not be a protection or defense, any more than an execution fair on its face would justify, in a case like the present, a presumption that it was founded on a valid judgment; for the docketing of the judgment in the county to which the execution was issued was as indispensable to the defense as that there should be a judgment on which it was founded. It was error, therefore, to refuse to strike out the evidence of a levy on the property under the execution to the sheriff of Polk county, and to direct the verdict in question.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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MORRISSY, Respondent, vs. THE COOLIDGE FUEL & SUPPLY COMPANY, imp., Appellant.

September 7 — October 2, 1894.

Contracts: Contradictory pleadings: Evidence: Husband and wife.

Plaintiff commenced an action against her husband for services as cook in a lumber camp, and in the complaint, and also in the affidavit for attachment and the verified claim for a lien on railroad ties cut by the men for whom she cooked, stated that she did the work for her husband and that he promised to pay her therefor. She also testified to the same effect on the trial. On an appeal to the circuit court the complaint was amended so as to allege that she did the work for the owner of the ties, a corporation with which the husband had a contract to get out such ties. The amended complaint also alleged that all the statements in the claim for a lien were true. Upon the trial in the circuit court the testimony of the plaintiff and her husband showed that she was to be paid out of the money coming to him on his contract. *Held*, that a verdict finding that the plaintiff did the work as an employee of the corporation and under a contract with it was not supported by the evidence.

APPEAL from the Circuit Court for *Chippewa* County.

The facts are stated in the opinion.

For the appellant there was a brief by *Jenkins & Jenkins*, and oral argument by *John J. Jenkins*.

For the respondent there was a brief by *W. H. Stafford* and *Vesper Morgan*, attorneys, and *C. W. Gilman*, of counsel, and oral argument by *Mr. Stafford* and *Mr. Morgan*.

ORTON, C. J. This action was tried on an amended complaint construed to mean that the plaintiff worked as a cook for the defendant company in its lumber camp, in Chippewa county, in boarding the men who were getting out ties for the defendant, on and between the 7th day of September, 1891, and the 9th day of April, 1892, both days inclusive, for $60 per month, continuously while the men

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were getting out the ties for the defendant, amounting in all to the sum of $450.75. The plaintiff also claims in the amended complaint that she performed said labor and service in good faith for said defendant, and that the defendant company promised to pay her therefor. The plaintiff asks for a personal judgment against the defendant company, and a lien upon the 20,000 railroad ties of the defendant which were cut and made by the men for whom she worked as cook in camp during that time.

The court submitted to the jury the following question: "Was the work mentioned in the complaint performed by plaintiff for the *Coolidge Fuel & Supply Company*, as its employee, under a contract between her and said company?" The jury answered "Yes," and thereupon the court rendered a personal judgment against the company for $450 and costs, and this appeal is taken therefrom.

We think this judgment should be reversed on the merits of the case. The evidence seems to be clearly against the special verdict that finds the work performed by the plaintiff was for the defendant company, as its employee, under a contract with the company.

1. The pleadings and history of the case are strong evidence against this finding. The action was first brought by the plaintiff, in the municipal court of Chippewa county, against Frank M. Morrissy, her husband, alone, and the present defendant was not known in the case as the owner of the ties on which she claimed a lien. (1) Her affidavit for an attachment of the ties states that the defendant Frank M. Morrissy is personally liable to the plaintiff for the demand, and is indebted to her therefor; that she did the work at his special instance and request; and that he agreed to pay her what her services were reasonably worth. (2) The plaintiff's claim for a lien on the ties is for labor and services as a cook in camp, for and at the special instance and request of Frank M. Morrissy, and for which he

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promised and agreed to pay her what it was reasonably worth, and she asked a lien on the ties therefor. The claim states also that the sum of $475.50 for such work and labor is due the plaintiff from the said Frank M. Morrissy, over and above all legal setoffs. This claim was sworn to by the plaintiff the 13th day of April, 1892. (3) The plaintiff stated in her original complaint that the work was done at the special instance and request of her husband, the said Frank M. Morrissy, for which he promised to pay the plaintiff what it was reasonably worth. After this action was commenced, the defendant the *Coolidge Fuel & Supply Company* made application to be made a party thereto, as the owner of the railroad ties attached for the lien, which was granted; and said defendant answered said complaint, setting up that the plaintiff and the defendant Frank M. Morrissy were husband and wife, and that if the plaintiff performed any work or labor, and earned anything therefor, the same accrued from labor performed for said defendant Frank M. Morrissy and in his employ, and payable by him, and for which she could not recover. In said municipal court, judgment was rendered against the plaintiff, and she appealed therefrom to the circuit court for Chippewa county. (4) In said circuit court the plaintiff obtained leave to amend her complaint, and it was so amended that it stood against the said defendant company alone, and alleged that the work, labor, and services were performed for said defendants, and for which they promised to pay the plaintiff, at the special instance and request of the defendant Frank M. Morrissy, and the plaintiff demands judgment for $450 therefor against the defendant company. It is stated also in said amended complaint that the plaintiff filed the above claim, and that "*all the statements and allegations contained in said claim are true.*" This amended pleading is not verified, but the above claim was sworn to by the plaintiff. That claim alleges that the

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plaintiff's services as cook in camp were rendered for the said Frank M. Morrissy and at his special instance and request, and that he promised and agreed to pay her therefor. This amended complaint therefore involves a direct contradiction. If all the statements and allegations in that claim are *true*, as is alleged, the other statement that such services were rendered for the defendant company cannot be true. The plaintiff's affidavit and claim under oath, upon which this action is predicated, have not been amended, and the truth of which has been thus reasserted, ought to stand as the true grounds of the action.

This action is brought to obtain a personal judgment against Frank M. Morrissy for the plaintiff's services, rendered for him and at his special instance and request, and for which he agreed to pay, and further for a lien on the railroad ties of the defendant company, and it has not been changed by any amendment. To repeat, the plaintiff reasserts the truth of all the statements and allegations in her verified claim in this pretended amendment of the complaint, and for her sake, as well as for correct practice, these original pleadings stand as the pleadings in the action.

2. But this is not all. The plaintiff's testimony supports her affidavit, claim, and pleadings. On the trial of the action before the municipal court the plaintiff testified, as a witness, that "she was employed by her husband, Morrissy, to perform these services, and that she worked for him." This is testified to by the judge of the municipal court before whom the action was tried. The testimony tended to show that the defendant company employed Frank M. Morrissy to get out a lot of railroad ties, and was to pay him 16 or 16½ cents apiece. Morrissy was embarrassed, and could not get trusted for the necessary supplies or for the labor of others; and it was agreed that the company should furnish the supplies and pay the laborers, and

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that the same should be reimbursed out of the money that was to be paid for getting out the ties, and if anything was left after paying these charges it should go to Morrissy. This contract was verbal, and made about the 1st of September, 1891. There is no dispute about this contract. When the work was ended there was nothing coming to Morrissy. He had been paid up in full. Both the plaintiff and her husband testified on the last trial, in a rather uncertain way, that the company employed the plaintiff as cook in the Morrissy camp, and promised to pay her. But they both testified on cross-examination that her services, as well as all the other labor, "was to come out of the ties;" meaning, of course, out of the money coming to Morrissy for getting out the ties. This destroyed the effect of their previous testimony. The testimony on behalf of the company was very positive and explicit that the company never employed plaintiff or agreed to pay her. The persons who were present at the time and place when and where the plaintiff testified Coolidge promised, for the company, to pay her for her services, testified that no such thing occurred, but, on the other hand, that the plaintiff said that she did not want them to pay her and did not expect it, but that she was working for what they could make out of the tie contract, so as to pay up their debts. I do not state the testimony literally, but its legal effect. It would have been most unreasonable for the company to employ the plaintiff, and agree to pay her $450 for her services as cook in her husband's camp, over and above 16½ cents per tie on her husband's contract, for this would have been a mere gratuity. Their testimony that her services were to be paid for out of the ties or the money for the ties, if there was anything coming to her husband on the tie contract, was reasonable, whether true or not. The plaintiff attempted to testify directly contrary to her testimony in the municipal court, but failed, fortunately, on cross-examination, when she testified that her labor had to

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come out of the ties. The plaintiff should not have been allowed to testify in contradiction of her affidavit, her verified claim, her original complaint in the action, and of her testimony before the municipal court, and it does not appear that she did so. There was really no testimony to support the special verdict of the jury or the judgment.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

BLEWETT, Respondent, vs. MCRAE and others, Appellants.

September 7 — October 2, 1894.

Contracts: Purchase of land jointly with vendor's agents: Default in payments: Recovery of money paid: Fraud: Rescission.

1. Plaintiff and defendants agreed to purchase certain land, he taking a half interest and they the other half. Defendants paid the earnest money and took a receipt from the vendor, specifying when subsequent payments should be made and providing that in case of default in any payment said earnest money should be forfeited, time being of the essence of the contract. Plaintiff afterwards paid to defendants, who were agents of the vendor, a sum to balance the earnest money paid by them, and also his half of the next payment, and the same was applied by them accordingly. Plaintiff thereafter failed and refused to make further payments, and defendants completed the purchase and sold the land again at a loss. *Held*, that plaintiff could not recover from them the amount paid by him, as money had and received to his use.
2. Defendants' concealment of the fact that they were to receive a commission on the sale did not entitle plaintiff to recover the amount paid by him, no fraud having been practiced on him, and it appearing that they were to take an interest in the land only in case plaintiff's original associate failed to do so. *Grant v. Hardy*, 33 Wis. 668, distinguished.

APPEAL from the Circuit Court for *Douglas* County.

On March 10, 1891, the defendants were copartners engaged in the business of buying and selling real estate for

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others upon commission, in West Superior. Among others, they had four lots, belonging to one Stowe, for sale at the price of $8,800. On that day the plaintiff and one Anderson called upon the defendants and were shown by them various pieces of property they had for sale, including the four lots in question. Anderson said, in effect, to the plaintiff, in the presence of the defendants, that any deal he made with the defendants he (Anderson) would take a half interest in it, and thereupon he left for home. The plaintiff thereupon concluded to purchase a half interest in said lots, hoping that said Anderson would take the other half interest. The defendants agreed to take the other half interest in case Anderson eventually failed to do so. Thereupon, and on March 13, 1891, the defendants paid to Stowe $500 as an earnest and partial payment for said lots, and took from him a receipt of the same, wherein it was recited that the defendants therein agreed to pay for said lots as follows, in addition to the $500 so paid down, to wit, $500, March 16, 1891; $1,000, March 19, 1891; $3,300, April 6, 1891, upon the delivery of a good and sufficient deed of conveyance; and the balance of $3,500 one year from that date, with interest at eight per cent. per annum, payable semi-annually, to be secured by mortgage on the land; and that if the defendants failed in any of the things to be done by them in completing the purchase, time being of the essence of the contract, then the said earnest money so paid was to be forfeited. A duplicate copy of said contract was made, and one copy thereof thereupon delivered to the plaintiff.

The plaintiff then returned to his home in Fond du Lac, and thereupon sent to the defendants, inclosed in a letter, a draft for $1,000, with which the defendants were therein directed to cancel the plaintiff's obligations on said lot. He therein stated that he had had no opportunity to consult with Anderson as yet, but expected to see him the next

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Tuesday; that, as he understood matters, one half of this $1,000 was to balance the earnest money so paid by the defendants, and the other half to pay his half of the payment to come due March 19, 1891,—he, the plaintiff, controlling one half interest in the four lots. That $1,000 was received by the defendants about March 16, 1891, and so applied.

On March 18, 1891, the plaintiff wrote defendants to the effect that he had been unable to see Anderson, and that they might sell the property at any time the opportunity presented itself, and that they should not allow the delay on Anderson's part to interfere; that at any time the defendants thought they could get their money out of the deal, not to stop to consult him; and wanting to know what kind of a deal he could make with the defendants for the two inside lots. On March 20, 1891, the defendants replied, favoring a division of the property, and saying that they were perfectly willing that Anderson should go in with the plaintiff if he would do so soon. On March 23, 1891, the plaintiff wrote to the defendants to the effect that he had just learned that the $1,700 which he had counted on to meet his obligation with the defendants April 6th could not be at hand, and that he had experienced no little anxiety and worry on account thereof, and asking the defendants if they could not help him out. On March 24, 1891, the defendants wrote to the plaintiff to the effect that they had no money on hand, and that he had not better depend on them to sell the property, but he better be prepared to close up the deal, and that they would do the best they could to dispose of the property to the best advantage. On April 4, 1891, the plaintiff wrote to the defendants to the effect that it would be impossible for him to meet his obligation with the defendants April 6th, and asking for a few days of grace. On April 5, 1891, the defendants wrote to the plaintiff to the effect that they

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thought they could induce Stowe to extend the time of payment for four or five days, but that the plaintiff would have to hustle and get the money by the last of the week, as his failure had placed them in a peculiar position. On April 20, 1891, the plaintiff wrote to the defendants, in answer to a telegram, to the effect that he could not raise the money; that Anderson had given him the cold shoulder, and, as things then looked, he would soon be under water, and asking defendants to give him such a share in the property as the amount he had already paid would entitle him to. On April 25, 1891, the defendants wrote to the plaintiff to the effect that it would be impossible for them to do so; that, if the plaintiff failed to meet his obligation, they would be obliged to leave his money in until the property was sold to some one else. The defendants thereupon attempted to dispose of the property to one Sullivan, but failed to do so. On September 3, 1891, the defendants sold and conveyed the property to one Brooks for about $6,600.

On December 19, 1892, the plaintiff commenced this action to recover the $1,000 so paid in by him, as money had and received by the defendants. The answer of the defendants is a general denial. At the close of the trial the court directed a verdict in favor of the plaintiff and against the defendants for $1,023.33, and judgment for the same, with costs, was thereupon entered in favor of the plaintiff. From that judgment the defendants appeal.

Frederick H. Remington, for the appellants.

John Brennan, for the respondent, contended, *inter alia*, that the contract between plaintiff and defendants was a joint purchase, and therefore such a relation existed as required them to disclose to him that they were receiving a commission. *Grant v. Hardy*, 33 Wis. 668.

CASSODAY, J. The aggregate amount of the payments due on the purchase of the four lots from Stowe on and

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prior to March 19, 1891, was $2,000. The plaintiff sent to the defendants the $1,000 mentioned as his half of such payments, and to that extent canceled and discharged his "obligations" to Stowe and the defendants on the contract mentioned, and it was so applied by the defendants. Beyond question that payment gave the plaintiff an equitable interest in the land which he might have enforced had he made the other payments as he had agreed. By the terms of the contract, a failure to pay the second payment when due operated as a forfeiture of the payment previously made, and time was made therein the essence of the contract. The plaintiff is not here seeking to enforce the contract which he made, nor to enforce or obtain any interest in the land, nor to reach any share of the proceeds for which the land was sold, but to recover back the money he so paid upon the contract, which he was unable further to perform and therefore refused to perform. Inability and refusal to perform is certainly no ground for rescinding a contract by the party so in default.

The only other ground upon which a rescission is sought is that the defendants were to receive a commission of five per cent. on the sale from Stowe, and concealed that fact from the plaintiff. The plaintiff knew that the lots belonged to Stowe, and that the defendants were his agents in making the sale of them. He testified that one of the defendants informed him that they were to have no commissions. If that was true, then the services of the defendants were gratuitous — preposterous as that may seem to be. At the time the contract was made it was expected that Anderson would take a half interest in the lots, and the defendants were only to take the same in case Anderson failed, as he did. No fraud was practiced upon the plaintiff, and the case is clearly distinguishable from *Grant v. Hardy*, 33 Wis. 668, relied upon by counsel. In that case Hardy, by collusion with the vendor, and false pre-

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tenses practiced upon Grant, induced the latter to pay the entire purchase price and yet secure to Hardy the title to one fourth of the property without any payment from him. In the case at bar the plaintiff neither paid nor agreed to pay any commission, and hence the question of double commission is not involved.

As indicated, the action is purely one for money had and received. Such an action can only be maintained in a case where the defendant has received money which in equity and good conscience he ought to pay to the plaintiff. *Woodward v. Hill*, 6 Wis. 148; *Lawton v. Howe*, 14 Wis. 246; *Fay v. Lovejoy*, 20 Wis. 406; *Wells v. Am. Exp. Co.* 49 Wis. 229. This is not such a case. Had the defendants wrongfully refused to allow the plaintiff to share in the benefits of the contract, a different question would have been presented. *Colt v. Clapp*, 127 Mass. 476.

The facts in the record do not bring the case within the statute of frauds. *Whitman v. Lake*, 32 Wis. 189.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

VIPOND, Respondent, vs. TOWNSEND, Appellant.

September 7 — October 2, 1894.

Promissory notes: Stipulated attorney's fees, how recovered.

Where a promissory note stipulates for the payment of attorney's fees if suit be instituted thereon, such fees may be recovered in the action on the note.

APPEAL from the Superior Court of *Douglas* County.

This suit is brought to recover on a note of which the following is a copy:

"$10,000.00. Butte City, Montana, Dec. 1st, 1891.

"One year after date, without grace, for value received, I promise to pay to the order of *William C. Vipond* ten

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thousand dollars, payable at the banking house of W. A. Clark & Brother, Butte City, Montana, with ten per cent. interest per annum from date until paid, both before and after judgment, *and ten per cent. attorney's fees* if suit be instituted on this note. Value received.

"W. W. TOWNSEND."

Against the defendant's objection and exception the court below allowed the plaintiff to introduce evidence of the value of attorney's fees, and allowed the plaintiff judgment for the amount of the note and interest, and also the *sum of $445 attorney's fees*, besides the taxable costs and disbursements. The defendant appeals from so much of said judgment as allows the sum of $445 for attorney's fees. The appellant contends that no part of the attorney's fees mentioned in the note was due before the commencement of the action.

The cause was submitted for the appellant on the brief of *Knowles, Dickinson, Buchanan, Graham & Wilson*, and for the respondent on that of *Thos. W. Shackleford*, attorney, and *Towne & Davis*, of counsel.

To the point that plaintiff is limited in his recovery to the debt or damages due at the time of suing the note, counsel for the appellant cited *Nickerson v. Babcock*, 29 Ill. 497; *Easter v. Boyd*, 79 id. 325.

To the point that attorney's fees can be recovered in the action on the note and not in a separate action, counsel for the respondent cited *Shugart v. Pattee*, 37 Iowa, 422; *Smiley v. Meir*, 47 Ind. 559; *Glenn v. Porter*, 72 id. 525.

NEWMAN, J. It was not error to include the amount of the stipulated attorney's fee in the judgment. The stipulation for the fee was a part of the contract on which the action was based. It became due as soon as the action was commenced. It was due at the time of the entry of judgment. Its recovery was incidental to the recovery upon the principal cause of action. This is analogous to the

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uniform practice, from an early day, of including stipulated attorney's fees in foreclosure judgments. It has not been suspected that a separate action could be maintained for the recovery of such fees.

By the Court.— The judgment of the superior court of Douglas county is affirmed.

GOODMAN and others, Respondents, vs. BAERLOCHER, imp., Appellant.

September 8 — October 2, 1894.

Lien of subcontractors, etc.: Destruction of building before completion: Filing of claim: Neglect of duty by clerk.

1. Where a building being erected by a contractor is destroyed before its completion, material men and laborers are not entitled to any lien on the land under sec. 3315, S. & B. Ann. Stats.
2. Under sec. 3318, R. S., providing that no lien shall exist unless a claim therefor is filed within six months, the right to a lien is secured when, within that time, a claim is delivered to and left with the clerk to be filed; and the claimant will not be prejudiced by the failure of the clerk to perform his duty.

APPEAL from the Circuit Court for *Douglas* County.

The plaintiffs in this action, which is a consolidation of five several claims or actions by the respective claimants into one, sought to enforce liens for divers sums for materials and labor furnished and performed to and for the defendants Gross & Heimer, contractors, in and about the construction and erection of a building for the defendant *Baerlocher*, under a contract with her, upon lots 3 and 4 in block 3 in the fifth division of West Superior, Wis., for the sum of $5,150, exclusive of plumbing, gas fitting, and tin work, to be completed by August 8, 1891. Gross & Heimer had the building about two thirds completed, July 16, 1891,

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when it was blown down and destroyed, except the foundation consisting of piles driven in the ground. On August 5, 1891, Gross & Heimer again commenced the construction and erection of the building mentioned in the contract, on the same foundation, on said premises, under their said contract, and continued work thereon until November 15th in the same year; and, before any of the claims for liens on the several demands in this action had been filed in the office of the clerk of the circuit court, the defendant *Baerlocher* had paid said contractors, Gross & Heimer, or on their account, the full contract price for the said building, and on July 31, 1891, and before said claims for liens were filed, she borrowed of the defendant Sheldon $6,000, to be paid in seven years, with interest at eight per cent. per annum, and secured the same by note and mortgage of said lots, and this entire sum was expended in paying Gross & Heimer for constructing said building, and on debts contracted by them for that purpose.

(1) The claim of the plaintiffs *Goodman, Wilcox & Co.* is for $71 for materials that went into the first building. (2) The claim of the plaintiff the *Warehouse & Builders' Supply Company* was wholly for material that went into the same building. (3) The claim of *Peyton, Kimball & Co.* was for a balance for material, in the sum of $887.88, all of which went into the first building, except $75 thereof. (4) The claim of *J. B. Noyes & Co.* was for a balance of $209.66 for lumber and materials that went into the second building. (5) The claim of the plaintiff *L. H. Paddock* was for work and labor performed by him for the contractors in the first building to the amount of $26.10, and $8.80 on the second building, and as assignee of divers other small claims for work and labor for said contractors on said building, $145.82 of which was done and performed on the first building, and $38.55 on the second.

A question arose as to the validity of the claim for a lien

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filed by *J. B. Noyes & Co.*, on the ground that although it was deposited with the clerk of the proper court on the 20th day of November, 1891, and thereafter remained in his office as part of the files thereof, said clerk having received the same with another lien petition without noticing the fact, the former being folded inside of the latter, so that the petition in question was not indexed, neither was any file mark placed thereon, until the 24th day of May, 1892.

The defendant *Baerlocher* insisted, among other things, that Gross & Heimer, contractors, entered into an agreement with said *Noyes & Co.* whereby they were to furnish and sell all the lumber necessary to complete said building for the agreed sum of $992.82, and that *Noyes & Co.* were not to furnish said contractors any more or other lumber to be used on the building, except as provided by said contract, without the consent of the defendant; and this was upon the express understanding that said premises would not be subject to any lien by reason of any more or other lumber furnished by said *J. B. Noyes & Co.* and used in said building without such consent. The testimony on this subject was conflicting, and the court, in substance, found against the defendant's contention.

As conclusions of law the court found: (1) That the destruction of the first building did not cut off the liens on the premises upon which such building was situated, for indebtedness accrued for material and labor in its construction. (2) That the liens for indebtedness accrued in the construction of the first building have precedence over the mortgage to the defendant Sheldon, the building having been commenced before the giving of such mortgage, but that as the construction of the second building was commenced subsequent to July 31, 1891, the date of the mortgage lien, all liens that exist for indebtedness which accrued in the construction of such second building are subject to

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said mortgage lien; that the claimants the *Warehouse & Builders' Supply Company*, *Goodman, Wilcox & Co.*, *H. M. Peyton* and *L. A. Barber*, surviving partners of Peyton, Kimball & Barber, for materials, etc., were entitled to liens upon all the interest of defendant *Baerlocher* in and to the lots described in the complaint, upon which the building was situated in the construction of which the indebtedness accrued at the time of its commencement; that said *Peyton* and *Barber*, as surviving partners, etc., were entitled to a lien for the said sum of $75, and the said *J. B. Noyes & Co.* for $209.61, both of which claims were for materials, etc., and *L. H. Paddock* for labor in the sum of $47.35 upon the building actually constructed upon the said lots, and upon all the right, title, and interest of the said defendant *Baerlocher* in and to the lots at the time of the commencement of the construction of the first building, for $171.92 for work and labor thereon. And the court rendered judgment accordingly, from which the defendant *Baerlocher* appealed and assigned various errors.

W. E. Hoehle, *J. P. Geiser*, and *D. E. Roberts*, for the appellant.

For the respondents *Peyton, Kimball & Barber* and *J. B. Noyes & Co.* there was a brief by *Ross, Dwyer & Hanitch*, and oral argument by *W. D. Dwyer*. They argued, among other things, that the duties imposed upon an officer by way of indexing and indorsing, after the paper has been put into his custody, do not constitute any part of the filing so far as the party delivering the paper is concerned. *Cook v. Hall*, 6 Ill. 575; *Naylor v. Moody*, 2 Blackf. 247; *Gorham v. Summers*, 25 Minn. 81; *Holman v. Chevaillier*, 14 Tex. 337; *Bishop v. Cook*, 13 Barb. 329; *Dodge v. Potter*, 18 id. 193; *Dikeman v. Puckhafer*, 1 Abb. Pr. (N. S.), 32; *People v. Bristol*, 35 Mich. 28; *Smith v. Waggoner*, 50 Wis. 155. If a party has complied with the statutory requirements his rights cannot be prejudiced by the neglect or misconduct

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of the officer. *Floyd v. Chess-Carley Co.* 76 Ga. 752; *Speakman v. Knight*, 3 Phila. 25; *Grubbs v. Cones*, 57 Mo. 84.

A separate brief was signed by *John Brennan* for the respondent *Paddock*, and *Swift, Murphy & Bundy* for the respondents *Goodman, Wilcox & Co.*, and the cause was argued orally by *Mr. Brennan*. They contended, *inter alia*, that in this state the object of the lien law is to provide security for the payment of claims of laborers and material men; and the lien on the land is not an incident to that on the building. In states where the object of the law is the same as ours it is held that the destruction of the building does not destroy the lien. *Clark & Co. v. Parker*, 58 Iowa, 509; *Freeman v. Carson*, 27 Minn. 516; *Steigleman v. McBride*, 17 Ill. 301; *Gaty v. Casey*, 15 id. 189; *Schwartz v. Saunders*, 46 id. 18; *Suntag v. Brennan*, 75 id. 279; *McLaughlin v. Green*, 48 Miss. 175; 2 Jones, Liens, § 1539; Phillips, Mech. Liens (2d ed.), 22.

PINNEY, J. 1. The original contractors, Gross & Heimer, had not performed their contract when the first building, being in an incomplete condition, was destroyed. It had not been delivered to or accepted by the owner, and was therefore at the risk of the contractors, and the destruction of the building did not excuse them from performing the contract. *Dermott v. Jones*, 2 Wall. 1; *Adams v. Nichols*, 19 Pick. 275; *Tompkins v. Dudley*, 25 N. Y. 272; *School Trustees v. Bennett*, 27 N. J. Law, 515. In *Tompkins v. Dudley*, *supra*, it was held that the owner of the lots might recover back from his contractor payments in such case which he had made on account of the building. In this case the building had not only not been completed, but it had been utterly destroyed, so that the owner of the ground had received no benefit from the materials and work and labor employed in attempting to build it, and the original contractors could not have recovered anything or enforced

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a lien for what had been furnished or done in attempting to construct and erect the building. Whether the subcontractors or material men and laborers under the contractors are in any better situation, is the question to be determined.

Sec. 3314, R. S., provides that: "Every person who as principal contractor, . . . performs any work or labor, furnishes any material, . . . in or about the erection, construction, . . . of any dwelling house, building, . . . *shall have a lien thereon, and upon the interest of the owner of such dwelling house, building, . . . in and to the land upon which the same is situated,* . . . not exceeding in extent," etc. And sec. 3315 extends the right to "every person who, as subcontractor of a principal contractor, or employee of any contractor or subcontractor, performs any work or labor for, or furnishes any materials to a principal contractor or subcontractor in any of the cases mentioned in the preceding section," if within sixty days thereafter he gives the specified notice in writing to the owner, or his agent, of the property to be affected by such lien, "with a statement of the labor performed or materials furnished, and the amounts due from such principal contractor or subcontractor, and that he claims the lien given" by ch. 143, R. S.

The lien provided by the statute is "in the nature of a charge on land given by statute to the persons named therein to secure a priority or preference of payment for the performance of labor or supply of materials to buildings or other improvements, to be enforced against the particular property in which they have become incorporated, in the manner and under the limitations therein expressly provided." Phil. Mech. Liens, § 9. In *Van Stone v. Stillwell & B. Mfg. Co.* 142 U. S. 128, 136, it was said, in substance, that the lien is given to secure priority of payment of the price and value of work performed and the materials furnished; that "it is the *use* of the materials fur-

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nished and *labor expended* by the contractor, *whereby the building becomes a part of the freehold*, that gives the material man or laborer his lien under the statute." The object is not only to encourage building, but to afford the contractor, material man, or laborer security upon and against the property of the owner materially increased in value by the materials and labor wrought into it, and so rests upon the strongest equitable basis, for the building becomes a part of the realty, and it is the principal matter, to which the lien on the realty seems to be an incident, and without which the lien on the building would be fruitless or of little value. In *Mallory v. La Crosse Abattoir Co.* 80 Wis. 170, 175, in which the remedy given by this statute to subcontractors, laborers, and material men was considered, it was said: "The theory of the law giving to laborers and material men specific liens upon the property upon which their labor was performed or their materials used seems to be that, because the value of such property has been enhanced thereby, it is just that the property should be specifically charged with the sums expended thereon for those purposes. The reason of the law extends to expenditures on the property by subcontractors as well as by those who contract directly with the owner." And the cases of *Munger v. Lenroot*, 32 Wis. 544, and *Winslow v. Urquhart*, 39 Wis. 260, really rest upon this ground.

In this case the defendant *Baerlocher*, the owner of the lots, has received no benefit whatever from the material and labor in question, and the principal contractors were clearly not entitled to any compensation for them, nor to any lien on the lots, on that account. This case is not, we think, within the statute relied on, for the statute does not extend to the case where no building is erected or constructed and no benefit has passed to or been accepted by the lot owner. To apply the statute so as to extend its provisions to such a case as the present would, we think,

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be giving it not merely a liberal, but a most latitudinarian and unreasonable, construction, and to mistake the incident as the subject of the lien for the principal thing which gives increased value to the ground upon which it has been erected, and would require the lot owner to answer through his property for the materials and labor that had entered into the building destroyed, from which he has not and could not derive any benefit, and would leave him without any remedy whatever against the principal contractor; making him practically an insurer of property over which he had not acquired control, and which remained at the risk of the contractors. If the second building shall be destroyed before its completion, it might thus transpire that the lot owner, according to the respondents' contention, might be wholly deprived of his lots without any fault of his own, and without having received any benefit or compensation therefor whatever.

Under a statute in Pennsylvania not materially different from the one in question, it has been held that the lien on the building is the principal thing, and the lien upon the land on which it is situated is an incident of the completion of the building, and that when the building is destroyed, by fire or otherwise, before completion, there can be no lien against the land on which it was attempted to erect it; that the lien shares the fate of the building; and that the reason for binding the land ceases with the destruction of the building. *Presbyterian Church v. Stettler*, 26 Pa. St. 246; *Wigton and Brook's Appeal*, 28 Pa. St. 161; *Linden Steel Co. v. Rough Run Mfg. Co.* 158 Pa. St. 238, 246. This view is sustained by *Coddington v. Dry-Dock Co.* 31 N. J. Law, 477, 480, where it is said: "The act did not intend to give a lien on labor not performed on the land upon which it is to be a lien, nor on lumber before it was made land. . . . As soon as the lumber is converted into land, then the land is seized by the lien by reason of the building, and

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the building because it is a part of the land; and from thence it follows that if the land and the building, by any chance, become separated, the lien is lost on both,—the land, because it has lost the building and the increased value thereby given to it; and the building, because separated from the land." Houck, Liens, §§ 203–205; *Schukraft v. Ruck*, 6 Daly, 1. A different view, however, has been taken of the question by the courts of other states having statutes more or less similar to our own. *Freeman v. Carson*, 27 Minn. 516; *Gaty v. Casey*, 15 Ill. 189; *Steigleman v. McBride*, 17 Ill. 300; *Clark & Co. v. Parker*, 58 Iowa, 509.

The statute (sec. 3315), as it existed before the amendments thereto noted in S. & B. Ann. Stats. sec. 3315, provided that "in no case shall the owner be compelled to pay a greater sum for or on account of such house, building, or other improvement than the price or sum stipulated in the original contract or agreement." It was then amended (ch. 312, Laws of 1885, and ch. 535, Laws of 1887) so that if the price shall be fixed unnecessarily low, with intent to defraud subcontractors, the basis of the owner's liability shall be a fair price for the labor and materials used in the building, instead of the contract price. The next enactment (ch. 333, Laws of 1889) repealed the above restriction upon the liability of the owner, and makes him absolutely liable to such contractors as comply with the requirements of the law, for the amount of their claims, *without regard to the contract price of the building or the sum the owner may be indebted to the contractor* when notice of the subcontractor's claim for a lien is served, or at any other time. *Hall v. Banks*, 79 Wis. 233; *Mallory v. La Crosse Abattoir Co.* 80 Wis. 174, 175. The operation of the amendment of 1889 seems to be confined to the question of the *amount* for which a subcontractor, material man, or laborer under him may have a lien against the building and premises of the

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owner, and does not in any manner affect the question as to what may or may not wholly defeat or deprive him of any lien at all.

As already observed, it is very clear that the principal contractors in this case would not be entitled to recover or have a lien by reason of the partial construction of the building destroyed, and if the case is such that the principal contractor is not entitled to a lien for any other reason than that he has been paid in full, as in case of abandonment of his contract or of destruction of the building before completion, the subcontractors under him, and their material men and laborers, would not seem to be entitled to any lien. The law was so held in *Malbon v. Birney*, 11 Wis. 107, 110, where it was held that one who had furnished lumber to a principal contractor, which he had used in the construction of the building, and had voluntarily abandoned his work, could not recover against the owner as a subcontractor under such principal contractor by virtue of the lien law, and it was said that "if Kennedy [the contractor] could not have recovered on a *quantum meruit* for his labor and on a *quantum valebant* for the materials, the respondents [the material men] ought not to sustain this action." And it seems clear that the rule must be the same where the building has been wholly destroyed before completion. That the rule in *Malbon v. Birney*, *supra*, has not been affected by the amendment by ch. 333, Laws of 1889, of sec. 3315, R. S., seems obvious from an inspection of its language, making it the duty of the principal contractor to defend any action brought to enforce a lien by any subcontractor or material man or laborer under him at his own expense, and that "during the pendency of such action the owner may withhold from the contractor the amount of money for which such lien shall be filed, and in case of judgment against the owner or his property upon the lien, he shall be entitled to deduct from any

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amount due from him to the contractor the amount of such judgment and costs, and if he shall have settled with the contractor in full, shall be entitled to recover back from the principal contractor any amount so paid by the owner for which the principal contractor was originally liable." The provision in question is plainly restricted to a case such as was before the court in *Mallory v. La Crosse Abattoir Co.* 80 Wis. 170, where the building had been completed, and where the controversy was as to the liability of the owner to pay, through his property, the sums due from the principal contractor to his subcontractors, material men, or laborers, although in excess of the contract price for erecting the building. Its entire scope is restricted to allowing the owner to deduct from the contract price due and unpaid by him to his contractor the amount of the judgment and costs recovered against the latter, and, *if he shall have settled* with the contractor in full, he is allowed to recover back from the principal contractor any amount so paid by him, for which such principal contractor was originally liable. We hold, therefore, that by reason of the destruction of the first building before completion the several claimants plaintiffs who are material men and laborers are not entitled to liens on the lots for materials or for work and labor used and expended on such building; that those who furnished materials and performed work and labor on the second building are entitled to liens therefor on that building, and upon the right, title, and interest of the owner, *Baerlocher*, therein.

2. There is no preponderance of evidence against the finding of the court adverse to the defense set up by the appellant to the claim of *Noyes & Co.*, and hence there is no ground for disturbing the finding on that subject.

3. The objection that the claim of *Noyes & Co.* for a lien was not seasonably filed is, we think, untenable. It was delivered in due form to the proper officer to be filed. His

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failure to put his file mark on it and to make the docket entries on the docket of mechanics' liens within the prescribed six months for filing liens, will not defeat the claim. The statute provides for both *filing* and *docketing* the claim, and these are entirely different things. The law requires the *party* to file his claim for a lien, and the *clerk* is to docket it. R. S. secs. 3318, 3319. And sec. 3321 is that "any person having so *filed* such claim," etc. The rights of the claimant to a lien are secured when his claim therefor is delivered to and left with the clerk to be filed. The statute requires him to file it and to docket it. The first part of the section provides that within six months, etc., it "shall be filed *as hereinafter provided*," and in the latter part that "such claim for lien may be *filed* and *docketed* within such six months, notwithstanding the death of the owner of the property affected by it," etc.; and this is the "hereinafter provided," and satisfies the previous requirement of the section, for there is no other provision in the statute to which it can possibly apply. It certainly does not refer to docketing the claim. When the claimant has delivered his claim for a lien to the clerk and left it with him to be filed, he has done all he is required to do — all he possibly can do — to secure his rights, and he will not be prejudiced by the neglect of the clerk to perform in respect to it his duty as directed by the statute. Docketing the claim is not a prerequisite to securing the lien. *Smith v. Waggoner*, 50 Wis. 155; *Gorham v. Summers*, 25 Minn. 81; *People v. Bristol*, 35 Mich. 28; *Bishop v. Cook*, 13 Barb. 329; *Dodge v. Potter*, 18 Barb. 193.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded with directions to enter judgment according to this opinion.

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BRIGHT, Administrator, Respondent, vs. THE BARNETT & RECORD COMPANY, Appellant.

September 10 — October 2, 1894.

Death caused by negligence: Absence of privity or contract relation: Implied invitation to use defective staging: Act imminently dangerous to life: Instructions to jury: Evidence: Damages.

1. By a contract with the defendant company, which was the principal contractor for the erection of an elevator building, a fire extinguisher company was to construct and place certain apparatus in the building, and the defendant was to furnish the staging needed in performing the work. Through defendant's negligence a defective plank was used in such staging, and by reason thereof an employee of the fire extinguisher company was killed. *Held*, that the defendant was liable for such death, although there was no privity or contract relation between it and the deceased, on the ground that it had impliedly invited him to use such staging, and also on the ground that the negligent use of the defective plank was an act imminently dangerous to human life.
2. The plank having been used in a place where the deceased could not see the defect on account of darkness, he was not chargeable with contributory negligence in walking upon it.
3. An instruction that "ordinary care is such care as the majority of persons would exercise under the circumstances," was correct.
4. In an action for the death of an unmarried man, to recover damages for the benefit of his parents, evidence that he had said that he did not intend to marry and that he would take care of his father and mother, was properly admitted.
5. An award of $4,000 in such a case is *held* not excessive, the jury having assessed the damages at $5,000, and the trial court having required the plaintiff to remit all in excess of $4,000.

APPEAL from the Superior Court of *Douglas* County.

Action to recover damages for the death of plaintiff's intestate, alleged to have been caused by the negligence of the defendant. The principal facts are stated in the opinion.

The mother of the intestate testified, under objection, that she had had conversations with her son about his

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future plans of living. "He said he did not intend to get married, and that he would not stay away long; that he wanted us to move to Cincinnati or Hamilton where he could get work with the pipe-fitters or gas-fitters or plumbers. I told him he would get married, and he said that he would not, but that he would take care of us when we were old as we had taken care of him when he was young. He said he did not care whether his father worked any or not, but that he was able to take care of us. He said the same things oftentimes before." The father and a brother of the deceased also testified to the same effect.

On the subject of negligence and ordinary care the court charged the jury, among other things: "You understand from instructions you have had in other cases that ordinary care is such care as the majority of persons would exercise under the circumstances. Now this Mr. Thompkins, the deceased, owed it to himself to exercise ordinary care for his own safety. If he did not do it, and that lack of the exercise of ordinary care was the direct cause of his death, there can be no recovery in this case. Negligence is not to be inferred. That is, it isn't to be reached by conjecture. It must be shown by evidence. Now, unless the evidence here shows a want of ordinary care on the part of the deceased it cannot be found by you. It must be proved either directly or proved by inference from facts that are proved, that is, a natural inference from the facts that are proved."

The jury found a verdict in favor of the plaintiff and assessed the damages at $5,000. The court granted a motion to set aside the verdict, unless the plaintiff would remit all in excess of $4,000, which the plaintiff elected to do, and judgment was entered accordingly. The defendant appealed.

For the appellant there was a brief by *Catlin & Butler* and *Carl C. Pope*, and a supplemental brief and oral argu-

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ment by *Mr. Pope.* They contended, *inter alia*, that the deceased was the employee of the fire extinguisher company, and the appellant owed him no legal duty arising from contract or otherwise. The law is well settled that this action cannot be maintained. Cooley, Torts, 91; *Fawcett v. Y. & N. M. R. Co.* 71 Eng. C. L. 610; *McCall v. Chamberlain*, 13 Wis. 637–641; *Necker v. Harvey*, 49 Mich. 517; *Winterbottom v. Wright*, 10 Mees. & W. 109; *Losee v. Clute*, 51 N. Y. 494; *Devlin v. Smith*, 89 id. 470; *Cahill v. Layton*, 57 Wis. 614, 617; *Griswold v. C. & N. W. R. Co.* 64 id. 657, 659; *Ryan v. Wilson*, 87 N. Y. 471; *Cole v. McKey*, 66 Wis. 510; *Dowd v. C., M. & St. P. R. Co.* 84 id. 105–116. The fire extinguisher company owed to the deceased, its employee, the duty of a careful inspection of the staging erected by the employees of the defendant, and could not delegate this duty to another. Bailey, Master's Liability, 129; *Flike v. B. & A. R. Co.* 53 N. Y. 549; *Fuller v. Jewett*, 80 id. 46, 52; *Vosburgh v. L. S. & M. S. R. Co.* 94 id. 374, 380; *Devlin v. Smith*, 89 id. 470, 476; *Probst v. Delamater*, 100 id. 266, 272; *Gottlieb v. N. Y., L. E. & W. R. Co.* id. 462–469; *Goodrich v. N. Y. C. & H. R. R. Co.* 116 id. 398–402; *Ford v. L. S. & M. S. R. Co.* 124 id. 493–498; *Cregan v. Marston*, 126 id. 568–572. The failure of the extinguisher company to discharge the duty of inspection was a new, independent, distinct, and proximate cause of the injury, and the defendant was thereby relieved from liability. *Moon v. N. P. R. Co.* 46 Minn. 106; 1 Shearm. & Redf. Neg. § 26; Wharton, Neg. § 438; Cooley, Torts, 70, 71, 78, 79; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469; *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 150; *Painter v. Pittsburgh*, 46 id. 213; *Godley v. Hagerty*, 20 id. 387; Bailey, Master's Liability, 97, note. The employees of the defendant worked under the direction of the fire extinguisher company in putting in the staging, and while doing that work must be regarded as the servants of that com-

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pany. *Wyllie v. Palmer*, 137 N. Y. 248, 257; 1 Shearm. & Redf. Neg. (4th ed.), 269, § 160; *Elder v. Bemis*, 2 Met. 604. The trial judge improperly allowed the plaintiff to prove the statements of the deceased to the effect that he was not going to marry and that he was going to devote his life to the support and care of his parents. This proof was offered and admitted in order to enhance the verdict for damages, and it certainly had that effect. Tiffany, Death by Wrongful Act, § 194. The amount of recovery must be confined to the actual pecuniary loss which the beneficiaries have sustained, and nothing as a *solatium*. Under all the authorities the damages in this case are excessive. Tiffany, Death by Wrongful Act, § 164, note 70; *Hutchins v. St. P., M. & M. R. Co.* 44 Minn. 5; *Potter v. C. & N. W. R. Co.* 22 Wis. 615; *Castello v. Landwehr*, 28 id. 522; *Ewen v. C. & N. W. R. Co.* 38 id. 613; *Hoppe v. C., M. & St. P. R. Co.* 61 id. 357; *Johnson v. C. & N. W. R. Co.* 64 id. 425; *Schrier v. M., L. S. & W. R. Co.* 65 id. 457; *Mulcairns v. Janesville*, 67 id. 24; *Annas v. M. & N. R. Co.* 67 id. 46; *Kaspari v. Marsh*, 74 id. 562; *Tuteur v. C. & N. W. R. Co.* 77 id. 505.

For the respondent there was a brief by *Crownhart, Owen & Foley*, and oral argument by *C. H. Crownhart*. They argued, among other things, that if the deceased was in pursuit of a matter of common interest to both himself and the defendant, or if the presence of the deceased upon the staging had a necessary or proper connection with any business he had of a common interest to himself and defendant, then there was an implied invitation by defendant to deceased to go upon the staging for that purpose. *Dowd v. C., M. & St. P. R. Co.* 84 Wis. 113–114; *Mulchey v. Methodist R. Soc.* 125 Mass. 487; *Cahill v. Layton*, 57 Wis. 613; *Powers v. Harlow*, 53 Mich. 507; 16 Am. & Eng. Ency. of Law, 413, 414, and notes; *Hayes v. Phila. & R. C. & I. Co.* 150 Mass. 457; *Bennett v. Railroad Co.* 102 U. S. 580;

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Heaven v. Pender, L. R. 9 Q. B. Div. 302; *Evansville & T. H. R. Co. v. Griffin*, 100 Ind. 221; *Campbell v. Portland S. Co.* 62 Me. 552; *Sweeny v. O. C. & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644, and note. The staging was imminently dangerous to human life, and defendant is liable to any person, who, in the discharge of his duties, is injured by its use, if the dangerous character could not be discovered by ordinary inspection. This liability rests on the duty the law imposes upon everyone to avoid acts in their nature dangerous to the lives of others. *Devlin v. Smith*, 89 N. Y. 470; *Coughtry v. Globe W. Co.* 56 id. 124; *Thomas v. Winchester*, 6 id. 397, and note, 57 Am. Dec. 461; *Manning v. Hogan*, 78 N. Y. 615; *The Rheola*, 19 Fed. Rep. 926; *The Wm. F. Babcock*, 31 id. 419; *Gerrity v. The Bark Kate Cann*, 2 id. 241; *Wellington v. Downer K. Oil Co.* 104 Mass. 64; *Norton v. Sewall*, 106 id. 143; *Lechman v. Hooper*, 52 N. J. Law, 253; *Van Winkle v. Am. S. B. Co.* id. 240. This court has repeatedly sustained much larger damages in this class of cases, considering the evidence. *Schrier v. M., L. S. & W. R. Co.* 65 Wis. 457; *Tuteur v. C. & N. W. R. Co.* 77 id. 505; *Potter v. C. & N. W. R. Co.* 21 id. 373; *Potter v. C. & N. W. R. Co.* 22 id. 615; *Castello v. Landwehr*, 28 id. 522; *Ewen v. C. & N. W. R. Co.* 38 id. 615; *Hoppe v. C., M. & St. P. R. Co.* 61 id. 357; *Johnson v. C. & N. W. R. Co.* 64 id. 425; *Lawson v. C., St. P., M. & O. R. Co.* id. 447; *Mulcairns v. Janesville*, 67 id. 24; *Annas v. M. & N. R. Co.* id. 46; *Kaspari v. Marsh*, 74 id. 562; *McKeigue v. Janesville*, 68 id. 50; *Wiltse v. Tilden*, 77 id. 152; *Faerber v. T. B. Scott L. Co.* 86 id. 226; *Railroad Co. v. Barron*, 5 Wall. 90; *Bierbauer v. N. Y. C. & H. R. R. Co.* 77 N. Y. 588; *Erwin v. Neversink Steamboat Co.* 23 Hun, 573.

OBTON, C. J. This action is brought by the administrator of the estate of Benjamin Thompkins, deceased, who was killed through the negligence of the defendant com-

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pany, to recover damages for the benefit of his father and mother, who were dependent upon the deceased for their support. The deceased was thirty-one years of age and unmarried, and his father and mother were about of the age of fifty-five years. The defendant was engaged in building an elevator for grain, in the city of Superior, Wis., and contracted with the General Fire Extinguisher Company to construct, fit, and place therein certain fire extinguishing apparatus and appliances, and the defendant was to furnish the staging that the men employed by the General Fire Extinguisher Company might need in performing said work. Said company needed a staging or a plank walk of a single plank, about sixteen feet long, twelve or fourteen inches wide, and two inches thick, thrown across the bins, about seventy feet from the bottom or above the floor, on which the employees of said company might stand or walk across, back and forth, while prosecuting said work. The defendant contracted and undertook to make and furnish such staging or walk across one of said bins, strongly fastened at each end on cleats on the sides of the bin, on which the deceased and other employees of said company could safely stand or walk while engaged in said work. This particular plank had a large knot, extending nearly across it, about five feet from one end. In prosecuting his work, it was necessary for the deceased to walk across said plank; and on the 10th day of August, 1893, while he was attempting to walk across the same, the said plank broke at said knot and precipitated him to the lower floor of the bin, and killed him instantly. It was so dark in the bin at the time that the deceased could not have seen such defect in the plank, and he had no notice or warning of its defective and dangerous character or condition. Many of the planks used in similar staging in the bins of the elevator had been inspected and tested, but this plank had not been inspected or tested before it was used in this way.

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The learned counsel of the appellant say in their brief: "By some means, a plank with a bad knot which could readily be detected by the eyesight was put into the staging by some employee of the appellant, it is supposed." And again they say: "And it was very dark in the elevator at the time of the accident. Could not see anything plainly, only the outline of things generally, and could not see the knot in the plank before referred to when looking down upon it." James Gunning, a witness on behalf of the plaintiff, testified that "he was a carpenter, and was helping the defendant put in these walks and staging. Mr. Clapp was his foreman. He was working for the defendant. He gave him directions how the planks were to go in there. Told him they were for men to walk on in putting up the pipes. He got all his instructions from Mr. Clapp. There were different ones worked with him,—four right along, including himself. There were two fellows that worked in where the accident happened. He thought they were just common laboring men. He does not know who put in the particular plank in question in third bin." M. D. Clapp, referred to above, as a witness on behalf of the defendant, testified "that he was in the employ of the defendant August 10, 1893, at Superior, Wisconsin, on general elevator work. [Witness examines broken plank] and swears it was never tested. He instructed those common street laborers to make this test of the plank, and saw two thirds of them tested, at the least calculation. The broken plank never passed the test. He knew to put in a plank like that meant practically to murder a man." The testimony very clearly shows that the fire extinguisher company gave directions how and where the walks and staging were to be built, but had no supervision of the work or materials used in their construction. The defendant company, according to their contract, undertook to furnish the materials and construct and place the walks and staging in

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a safe and suitable manner, for the use of the deceased and other employees of the fire extinguisher company, to stand on and to walk across while doing their work.

1. On the question of the liability of the defendant to the plaintiff, there was no conflict in the evidence. It was all one way. To say the least, the defendant was guilty of the want of ordinary care in furnishing such a grossly defective plank for staging for the deceased to stand and walk on while doing his work. The circuit court was therefore justified in instructing the jury "that the defendant here is responsible in this case, as a matter of law, unless the deceased himself is chargeable with contributory negligence." The first position taken by the learned counsel of the appellant in their brief is that the appellant owed the deceased no legal duty arising from contract or otherwise. This is no doubt the general rule. "The liability of the builder or manufacturer for such a defect is in general only to the person with whom he contracted." But this case belongs with a class of cases that can be sustained outside of this general principle, and may rest on two well-established principles of law:

(1) The defendant, in furnishing this staging for the use of the employees of the fire extinguisher company, on which they might stand or walk in doing their work, had in effect *invited* and induced the deceased to walk on it while doing his work, and was liable to him if he suffered injury from its defective condition caused by negligence in its construction. The case may rest on this simple *implied invitation*. *Gilbert v. Nagle*, 118 Mass. 278; *Elliott v. Pray*, 10 Allen, 378; *Pickard v. Smith*, 10 C. B. (N. S.), 470; *Indermaur v. Dames*, L. R. 1 C. P. 274; *Holmes v. N. E. R. Co.* L. R. 4 Exch. 254; *Coughtry v. Globe W. M. Co.* 56 N. Y. 124; *Mulchey v. Methodist Rel. Soc.* 125 Mass. 487. This last case is closely in point. The Methodist Religious Society employed Needham to paint inside of its church build-

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ing, and agreed to erect and remove the staging on which the employees of Needham could stand while doing their work. The plaintiff was one of Needham's employees, and, while standing on the staging put up for painting the ceiling of the church, it broke from under him, and he fell and was injured. The same ground was taken in that case as in this,—that there was no privity or contract relation between the plaintiff and the society, and that the society owed the plaintiff no duty. The staging was defectively constructed, through the negligence of the society and its servants. The plaintiff recovered, and in the supreme judicial court the exceptions were overruled. The case rested on this principle of *implied invitation*, that the society invited and induced the plaintiff to stand upon the staging, to his injury, occasioned by its own negligence.

(2) Such liability may rest upon the duty which the law imposes on every one to avoid acts imminently dangerous to the lives of others. This liability to third parties is held to exist when the defect is such as to render the construction in itself imminently dangerous, and serious injury to any person using it is a natural and probable consequence of its use. This principle is illustrated in *Devlin v. Smith*, 89 N. Y. 470. The supervisors of Kings county employed Smith to paint the inside of the dome of the courthouse, and Stevenson was employed to build the scaffold by independent contract, on which the employees of Smith might stand while painting the dome. Stevenson was an experienced scaffold builder, and Smith was not. The scaffold was ninety feet in height. The plaintiff's intestate was a painter in the employ of Smith. There was an extremely dangerous defect in the construction of the scaffold, in consequence of which the plank on which the intestate was sitting gave way, and precipitated him to the floor below, and killed him. It was held that Stevenson was liable for the death, on proof of his negligence in the construction

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of the scaffold. RAPALLO, J., said in his opinion: "A stronger case where misfortune to third persons, not parties to the contract, would be a natural and necessary consequence of the builder's negligence, can hardly be supposed; nor is it easy to imagine a more apt illustration of a case where such negligence would be an act *imminently dangerous* to human life." We may be allowed to say that the present case is even stronger than that case in the dangerous character of the defect and in the certain fatality that was the natural and necessary consequence of it.

The following cases were sustained on one or the other or both of these principles, where there was no privity or contract relation between the parties: *Hayes v. P. & R. C. & I. Co.* 150 Mass. 457; *Elliott v. Hall*, L. R. 15 Q. B. Div. 315; *Bennett v. Railroad Co.* 102 U. S. 577; *Railroad Co. v. Hanning*, 15 Wall. 649; Cooley, Torts, 604–607; Whart. Neg. §§ 349–352; *Corby v. Hill*, 4 C. B. (N. S.), 562; *Powers v. Harlow*, 53 Mich. 507. This last case rests somewhat on the ground of license, and yet also on the ground of *invitation*. COOLEY, C. J., says in the opinion: "A person giving such license, especially when he gives it wholly or in part for his own interest, as was the case here, and thereby *invites* others to come upon his premises, assumes to all who accept the *invitation* the duty to warn them of any danger in coming which he knows of or ought to know of, and of which they are unaware." The case of *Heaven v. Pender*, L. R. 11 Q. B. Div. 503, is very closely in point. The defendant was the owner of a dry dock used for the painting and repairing of vessels, and he contracted with the owner of a vessel to use the dock for painting it, and was to put up and supply the necessary staging for that purpose. The owner employed a master painter to do the painting. The plaintiff was one of his employees; and while painting the outside of the vessel, and using for that purpose the staging put up by the owner, the staging gave

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way and he fell and was injured. The plaintiff was held entitled to recover. The case rested upon both principles of *implied invitation* to use the staging, and on the dangerous character of the construction, which was liable to injure those using the same, through the negligence of the owner who put it up. The Master of the Rolls cites the following cases as sustaining this principle of implied invitation: *Indermaur v. Dames*, L. R. 1 C. P. 274; *Winterbottom v. Wright*, 10 Mees. & W. 109; *Langridge v. Levy*, 2 Mees. & W. 519; *Francis v. Cockrell*, L. R. 5 Q. B. 184, 501. *Thomas v. Winchester*, 6 N. Y. 397, rests on the principle that the law imposes the duty of any one to avoid acts in their nature dangerous to the lives of others. *Coughtry v. Globe W. M. Co.* 56 N. Y. 124, is in point. The owners employed O. & M. to put an iron cornice on their mill, and agreed to put up the necessary scaffolding and staging on which they could do the work. The *deceased* was a workman of O. & M., and, while working on the cornice, the scaffold fell, through its negligent construction. See, also, *Evansville & T. H. R. Co. v. Griffin*, 100 Ind. 221; *Campbell v. Portland Sugar Co.* 62 Me. 552, 16 Am. Rep. 503; *Van Winkle v. Am. Steam Boiler Co.* 52 N. J. Law, 240; 16 Am. & Eng. Ency. of Law, 413, 414; and other cases cited in the brief of the respondent.

I have spent much time on this question of the defendant's liability to the plaintiff, for it is about the only question in the case. The negligence of the defendant in using and placing this plank, so obviously and dangerously defective for the plaintiff to walk on, seventy feet above the floor, is beyond question; and, as to the contributory negligence of the deceased, he was certainly not chargeable with any negligence whatever or any want of ordinary care in walking on the plank. He could not see the defect in the plank, on account of darkness. The servant of the defendant who put that plank in place might have expected

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this fatal result from its use. M. D. Clapp, a witness of the defendant, testified that he was the foreman who employed the man who put that plank in, and "that he knew to put in a plank like that meant practically to murder a man."

2. The definition of negligence given by the court in its charge to the jury was correct. *Duthie v. Washburn*, 87 Wis. 231; *Seymer v. Lake*, 66 Wis. 654; *McClure v. Sparta*, 84 Wis. 269.

3. The testimony for the plaintiff in respect to the relations of the deceased to his father and mother, his obligation to support them, and their dependence upon him for the same, does not appear to have been improper. *Johnson v. Mo. Pac. R. Co.* 18 Neb. 699; *Lowe v. C., St. P., M. & O. R. Co.* (Iowa) 56 N. W. Rep. 519; *Ewen v. C. & N. W. R. Co.* 38 Wis. 615; *Potter v. C. & N. W. R. Co.* 22 Wis. 615.

4. The damages, reduced by the court to $4,000, we do not think excessive. Great reliance ought to be put in the judgment and discretion of the trial court, specially exercised in reducing the amount of the damages found by the jury.

5. This is so plain a case upon the evidence, we do not think it was necessary for the court to give the instructions asked by the appellant, or to give any further instructions than were given, and they appear to have been sufficient and correct.

By the Court.—The judgment of the superior court is affirmed.

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CUSTEAU, Respondent, vs. ST. LOUIS LAND IMPROVEMENT COMPANY, Appellant.

September 10 — October 2, 1894.

Written contract for sale of land: Collateral oral agreement: Evidence.

A written instrument by which a land company acknowledged the receipt of a sum of money and gave the person paying it permission to enter upon a certain lot in its town site and to build thereon within a definite period, and agreed to sell the lot to him, upon the completion of the building, at a fixed price, and to apply thereon the sum already paid, and to convey the lot to him, taking back security for the deferred payments, is *held* to cover the entire contract of sale on the part of the company; and, there having been no fraud or misrepresentation of existing facts, an antecedent or contemporaneous oral agreement by the company, in consideration of such purchase, to build and maintain a large city upon said site, etc., could not be shown.

APPEAL from the Superior Court of *Douglas* County.

This action was commenced August 23, 1893. The complaint alleges, in effect, that the defendant is a foreign corporation; that prior to May 21, 1891, it was the owner of a large tract of land in Douglas county, which it had caused to be surveyed, platted, and laid out as a town site, named St. Louis; that May 21, 1891, the defendant entered into a contract with the plaintiff by which the defendant promised and agreed, in consideration of the plaintiff purchasing of the defendant a lot in said town site, and erecting thereon a two-story frame building costing not less than $1,000, that the defendant would build, establish, and maintain a large and flourishing town or city upon said site, and would make of it the greatest manufacturing city in the northwest, and would erect thereon at least 400 dwelling houses, and numerous large industrial plants, furnishing steady employment to more than 1,000 men, and maintain the same in steady operation, and would erect thereon a

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large flouring mill having a capacity of 7,500 barrels per day, and a large number of stores, banks, hotels, churches, and schools, and secure the location and operation thereon of the shops and terminals of the Duluth & Southern Railroad, and would maintain three trains per day on the Northern Pacific between St. Louis and West Superior, and would construct, maintain, and operate the St. Louis Terminal Railroad between St. Louis and Superior, and would construct a system of sewerage thereon, and improve and dredge the channel of the St. Louis river so as to make St. Louis accessible to the largest lake vessels, and would construct and maintain a good and sufficient harbor thereat, and lay out, grade, improve, and maintain a good and sufficient system of streets therein, and would induce a very large number of people to come to and reside permanently therein, and that all of said agreements on the part of the defendant would be performed during the years 1891 and 1892; that the plaintiff performed all the conditions and agreements therein to be performed on his part by purchasing the lot and constructing the building as agreed; that the defendant had wholly neglected and refused to fulfill the terms of the contract on its part. Judgment is demanded for $1,975, with costs. The defendant answered by way of certain admissions, and otherwise a general denial.

At the close of the trial the court directed the jury to return a verdict in favor of the plaintiff and assess his damages at $1,204. The jury having returned the verdict as directed, judgment was entered accordingly. The defendant appeals.

For the appellant there were briefs by *Knowles, Dickinson, Buchanan, Graham & Wilson*, and oral argument by *S. N. Dickinson.*

For the respondent there was a brief by *Loud & O'Brien*, and oral argument by *P. O'Brien.* They contended, *inter*

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alia, that the promises of the defendant to the plaintiff were never reduced to writing. The writing in this case, Exhibit A, is not the contract, but was made only in execution of the verbal agreement. Therefore no suit is brought upon Exhibit A, but on the verbal agreement. As the evidence showed conclusively that the contract in the case at bar remained in parol, verbal evidence was properly introduced to prove it. Such is the rule in this state. *Green v. Batson*, 71 Wis. 54; *Smith v. Coleman*, 77 id. 343; *Red Wing Mfg. Co. v. Moe*, 62 id. 240; *Kickland v. Menasha W. W. Co.* 68 id. 34; *Collette v. Weed*, id. 428; *Boothby v. Scales*, 27 id. 626; *Jilson v. Gilbert*, 26 id. 637; *Merriam v. Field*, 24 id. 640; *Hahn v. Doolittle*, 18 id. 196; *Ballston Spa Bank v. Marine Bank*, 16 id. 120; *Frey v. Vanderhoof*, 15 id. 401; *Rearich v. Swinehart*, 51 Am. Dec. 540. Where a verbal promise is made by one party which operates as an inducement to the other contracting party to enter into a written contract, it must be performed, and parol evidence is admissible for the purpose of proving it. *Welz v. Rhodius*, 87 Ind. 1; *Cullmans v. Lindsay*, 114 Pa. St. 166; *Walker v. France*, 17 Weekly Notes Cas. 313; *Jones v. Hardesty*, 32 Am. Dec. 180; *Greenawalt v. Kohne*, 85 Pa. St. 369; *Barclay v. Wainwright*, 86 id. 191; *Campbell v. McClenachan*, 6 Serg. & R. 172; *Powelton C. Co. v. McShain*, 75 Pa. St. 238; *Weaver v. Wood*, 9 id. 220; *Oliver v. Oliver*, 4 Rawle, 141; *Juniata B. & L. Asso. v. Hetzel*, 103 Pa. St. 507. Exhibit A does not purport to contain the entire agreement between the parties. The promises made to the plaintiff are not such as would naturally enter into such an instrument, and may be considered as ulterior and collateral thereto. Where the instrument does not purport to contain the entire agreement, or there is a collateral agreement not embraced therein, parol evidence is competent to show the omitted parts, whether contemporaneous or antecedent. Browne, Parol Ev. 125, § 50, and cases cited. The incom-

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pleteness of the instrument need not be manifest. 1 Greenl. Ev. § 284a; Browne, Parol Ev. 126. In the following cases agreements to purchase land were brought within the rule admitting parol evidence to show a collateral agreement: *Campbell v. McClenachan*, 6 Serg. & R. 172; *Perrine v. Cooley's Ex'rs*, 39 N. J. Law, 449; *Allen v. Pink*, 4 Mees. & W. 140; *Wendlinger v. Smith*, 75 Va. 309; *Fusting v. Sullivan*, 41 Md. 162; *Paul v. Owings*, 32 id. 402; *Pym v. Campbell*, 6 El. & B. 370; *Wallis v. Littell*, 11 C. B. (N. S.), 369.

CASSODAY, J. If the parties ever made such a parol contract as is alleged in the complaint, it was, to say the least, a very remarkable one. Whether such a contract, even had one been made in writing, could have been enforced, is very questionable.

On the trial, after the court had overruled a demurrer *ore tenus* and the plaintiff had been sworn and partially examined, he was, by leave of the court, examined by the defendant's counsel, and testified to the effect that the written contract (Exhibit A, dated May 21, 1891) shown to the plaintiff, and afterwards put in evidence, was the contract received by the plaintiff from the defendant; that it was made and delivered after all the plaintiff's conversation with the defendant, and after the plaintiff had paid to the defendant his money thereon; and that there was no other contract made after that between the plaintiff and defendant. Thereupon the defendant objected to any further testimony relative to a verbal contract made prior to the written one. The objection was overruled, and the plaintiff gave parol testimony tending to prove the allegations of his complaint. On cross-examination he testified to the effect that all of the conversation which he had related in court was had with the defendant's superintendent before the written contract was signed and delivered; that

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the superintendent made the contract with him, and that Exhibit A was the contract the defendant gave him. By the written contract the defendant, in effect, acknowledged that it had received $75 from the plaintiff, in consideration of which it had thereby given to him permission to enter upon the lot described and erect thereon a two-story frame store building to cost not less than $1,000, to be well built and painted and completed within sixty days from that date; and upon such completion the defendant therein agreed in effect to sell the lot to the plaintiff for $750, and apply the $75 as so much paid thereon, and thereupon to convey the premises to the plaintiff, taking back security for the deferred payments, which were to be made with interest as therein stated; and the building was to be insured by the plaintiff in the sum of $800 for the benefit and better security of the defendant.

Manifestly the written agreement covered the entire contract of sale on the part of the defendant. There is no pretense of any fraud or misrepresentation on the part of the defendant of any existing fact. The rule is firmly settled in this state to the effect "that, in the absence of fraud or mistake, proof of antecedent or contemporaneous verbal agreements between contracting parties cannot be received to alter or control their written agreement." *Herbst v. Lowe*, 65 Wis. 320; *Andrews v. Youmans*, 78 Wis. 58; *Ball v. McGeoch*, 81 Wis. 171. Because the court admitted evidence tending to prove such antecedent and contemporaneous verbal agreements the judgment of the superior court of Douglas county is reversed, and the cause is remanded for a new trial.

By the Court.— Ordered accordingly.

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BARTHELL, Respondent, vs. PETER, Appellant.

September 10 — October 2, 1894.

Real-estate brokers: Commissions: Mutual mistake of fact.

An agent for the sale of land, who agrees to pay a broker a commission if he will procure a purchaser, is liable for the commission if the purchaser is procured, though he then discovers that the land is not the property of his principal.

APPEAL from the Circuit Court for *Douglas* County.

The facts are stated in the opinion. A jury trial was waived. The defendant appeals from a judgment in favor of the plaintiff.

For the appellant there was a brief by *Catlin & Butler* and *Carl C. Pope*, and oral argument by *Mr. Pope*.

For the respondent there was a brief by *R. I. Tipton* and *E. F. McCausland*, and oral argument by *Mr. Tipton*.

WINSLOW, J. This action is brought to recover the commissions of a real-estate broker. The action was tried by the court. The facts were, and the court found, that the defendant, who was an agent to sell certain lands in Douglas county for a principal, agreed to pay the plaintiff a commission of $500 if he would find a purchaser ready, able, and willing to purchase a certain described parcel of real estate in Douglas county. The plaintiff found and produced such purchaser, and then defendant discovered that the said parcel of land was not the property of his principal; and he claims that this was a mutual mistake of fact, which avoided the contract to pay commissions on the sale. The plaintiff was in no way responsible for the defendant's mistake. On these facts judgment was rendered for the plaintiff. This judgment was plainly right. The defendant's mistake was not, within the meaning of the law, a mutual mistake. The fact concerning which

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the mistake was made was not an inducement to the contract, or material thereto, so far as plaintiff was concerned. The plaintiff performed the labor which he agreed to perform, and cannot be defeated by the fact that defendant was negligently mistaken as to a fact which was entirely immaterial to the plaintiff, and which should have been within the defendant's own knowledge.

By the Court.— Judgment affirmed.

SCHILLINGER, Respondent, vs. THE TOWN OF VERONA, Appellant.

September 10 — October 2, 1894.

Highways and bridges: Injury caused by defects: Evidence: Instructions: Court and jury: Improper remarks of counsel.

1. In an action against a town for injuries alleged to have been caused by a defective highway, it was error to permit a witness for the plaintiff to testify that, on the morning after the accident, the plaintiff pointed out to her the exact place where it occurred.
2. The refusal to give an instruction to the effect that it was incumbent upon the plaintiff to establish the facts essential to a recovery by a *preponderance of proof*, is *held* to have been error, such facts having been contested and nothing equivalent to such instruction having been given in the general charge.
3. The question as to the insufficiency of an embankment which constituted the approach to a bridge, and which had no railing on either side, is *held*, upon the evidence (which was conflicting as to the width, length, and height of the embankment), to have been a question of fact for the jury.
4. Upon the first trial of an action against a town for injuries alleged to have been caused by a defective highway, one C. testified for the plaintiff, but upon a second trial he was not called as a witness. In the closing argument to the jury plaintiff's counsel said: "I will offer now, if [defendant's counsel] will agree, to have it [C.'s testimony on the former trial] read in evidence. He don't dare do it." The court ruled that this was improper. Counsel proceeded: "We

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did not call C. because they elected him a member of the town board of this town. It was a piece of fine work. . . . We could not call C. and ask him what he testified to on a former trial. If he changed his evidence we would be bound by his testimony. But we did this,—we called him to the stand and asked the court if we could cross-examine him, under the rule you may cross-examine a party." Upon objection the court ruled that this was proper. *Held*, a material error.

APPEAL from the Circuit Court for *Dane* County.

The facts are stated in the opinion. The defendant appeals from a judgment in favor of the plaintiff.

For the appellant there was a brief signed by *Olin & Butler*, and oral argument by *H. L. Butler*, *J. M. Olin*, and *Burr W. Jones*. To the point that the remarks of counsel concerning the testimony of Mr. Cowie should work a reversal, they cited, besides cases cited in the opinion, *Thompson v. T., A. A. & N. M. R. Co.* 91 Mich. 255; *Sullivan v. Deiter*, 86 id. 404; *Augusta & S. R. Co. v. Randall*, 85 Ga. 297; *Moody v. Ala. G. S. R. Co.* 99 Ala. 553; *Rudolph v. Landwerlen*, 92 Ind. 34; *Laubach v. State*, 12 Tex. App. 583; *Conn v. State*, 48 Am. Rep. 337, note, 11 Tex. App. 380; *Hall v. Wolff*, 61 Iowa, 559; *Galveston, H. & H. R. Co. v. Cooper*, 70 Tex. 67; *Union Cent. L. Ins. Co. v. Cheever*, 36 Ohio St. 201; *Attaway v. Mattox*, 14 S. W. Rep. 1017; *Koelges v. Guardian L. Ins. Co.* 57 N. Y. 638; *Cleveland P. Co. v. Banks*, 15 Neb. 20; *Perkins v. Burley*, 64 N. H. 524; *Indianapolis J. N. P. Co. v. Pugh*, 6 Ind. App. 510; *Louisville & N. R. Co. v. Orr*, 91 Ala. 548; *Bullard v. B. & M. R. Co.* 56 Am. Rep. 819, note, 64 N. H. 27.

For the respondent there was a brief by *La Follette, Harper, Roe & Zimmerman*, and oral argument by *G. E. Roe*. They contended, among other things, that the evidence of the witness Meng, to which exception was taken, was not offered or admitted to prove the truth of the fact stated to the witness, but merely to show what it was that called her attention to a fact stated by her, or that fixed the fact in

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her memory; and its admission was not error. *State v. Fox*, 25 N. J. Law, 566; *Reed v. Madison*, 85 Wis. 667; *Karr v. C., R. I. & P. R. Co.* 54 N. W. Rep. 144; *Harris v. Cent. R. Co.* 78 Ga. 525; *Hill v. North*, 34 Vt. 604–616. The plaintiff having assumed the burden of proving that the defect had existed for a sufficient length of time to charge the town with constructive notice, the instruction asked by the defendant upon the burden of proof became unnecessary. *Spaulding v. C. & N. W. R. Co.* 33 Wis. 582; *Goff v. Stoughton S. Bank*, 78 id. 106; *Fletcher v. Milburn Mfg. Co.* 35 Mo. App. 321–329; *Blum v. Strong*, 71 Tex. 321. The question whether the narrow, high approach to the bridge, unguarded by any barrier, was a defect, is not a question upon which reasonable men might differ. *Seymer v. Lake*, 66 Wis. 651; *Prideaux v. Mineral Point*, 43 id. 513; *Fopper v. Wheatland*, 59 id. 623. The remarks of counsel in regard to the testimony of John Cowie were not improper. *Grace v. McArthur*, 76 Wis. 641; *Dugan v. C., St. P., M. & O. R. Co.* 85 id. 609; *Smith v. Nippert*, 79 id. 135.

OTON, C. J. This is the second appearance of this case in this court, and the facts are sufficiently stated in 85 Wis. 589. The plaintiff was driving a two-horse buggy towards the bridge from the north, and when the team had passed up the embankment which formed the approach to the bridge, and about thirty-three feet on the bridge, they stopped at a wide knothole and crack between the planks, through which they could see the running water in the river below, and commenced backing, and, according to the plaintiff's testimony, the rear wheels had turned to the east and the buggy went over the embankment just at its connection with the bridge,— but, according to testimony on behalf of the town, several feet further down the embankment,—and the plaintiff was injured. The embankment at

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the bridge was ten feet wide and about seven feet high, but was wider further down, and of course the height became less. The jury found that the hole in the bridge was naturally calculated to frighten horses of ordinary gentleness, and that plaintiff's horses were frightened by it, and that the town had notice of it, but they did not find that it was a cause of the accident. The jury found, also, that the insufficiency and want of repair of the approach to the bridge was one of the direct causes of the injury; and the court ruled, as a matter of law, that the approach was in a condition of insufficiency and want of repair. The verdict was $2,000 damages for the plaintiff.

It is to be regretted that this case has to be remanded for a third trial, on account of errors which we deem too material and important to be overlooked.

1. Catherine Meng, a witness for the plaintiff, testified that on Monday morning (the next day after the accident) she went with the plaintiff to the north end of the bridge in a buggy, and stopped a moment to see where the accident happened and how it looked. This witness was asked by plaintiff's counsel "whether the plaintiff pointed out to her the place where he went over the embankment, or not." This question was objected to, on the ground "that it was immaterial and hearsay." The court overruled the objection, and the witness answered: "Yes; he pointed out to me where he went over the embankment at the north end of the bridge." The answer was objected to as improper and the objection was overruled. This testimony, if it was proper, corroborated the testimony of the plaintiff that he went over the embankment at the north end of the bridge, or within two or three feet from the bridge. The place where the buggy went over the embankment was in dispute and material. The witness was allowed to testify to the statement of the plaintiff of a material fact in the case. This statement was not contemporaneous with the

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accident, or immediately connected with it, or a verbal part of the *res gestæ*. The ruling was clearly erroneous. *Sorenson v. Dundas*, 42 Wis. 642; *Felt v. Amidon*, 43 Wis. 467; *Mutcha v. Pierce*, 49 Wis. 231; *Prideaux v. Mineral Point*, 43 Wis. 513, 522; *Galveston v. Barbour*, 62 Tex. 172, 50 Am. Rep. 519.

2. The defendant's counsel requested the court to instruct the jury "that the burden of proof is upon the plaintiff to show that the defect existed in the highway in question which caused the injury to the plaintiff, and to further show that the said defect was of such a character and existed for such a length of time that the town authorities are presumed to have known of it; and unless you find that the plaintiff has established these points by a *preponderance* of proof he cannot recover and your verdict should be for the defendant." This instruction the court refused to give, and defendant excepted. These three facts were material for the plaintiff to prove: (1) The defect in the highway. (2) That such defect caused the injury. (3) That it was of such a character and had existed so long as to imply notice to the town. These issues were presented to the jury in the general instructions, but that these points must be established by a *preponderauce of proof* is not found anywhere in the charge of the court. This is a correct rule of evidence, which the court ought to have given, especially when requested. All the essential points of the case had been severally and ably contested, and it was highly proper that the jury should understand this rule. *Bean v. Elton*, 44 Ill. App. 442; *Cleveland, C., C. & St. L. R. Co. v. Richey*, 43 Ill. App. 247; *Gordon v. Richmond*, 83 Va. 436; *Watt v. Kirby*, 15 Ill. 200; *Texas T. R. Co. v. Ayres*, 83 Tex. 268.

3. The court instructed the jury as follows: "I have stated in your hearing, upon the facts as disclosed by the testimony it stands without dispute that this embankment

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is insufficient and in want of repair; that it is defective, in view of its construction, as to its width and length and the fact that no railing or guard was placed along the margin thereof, so that in your deliberation upon the case you must assume this is a fact." The fifth question in the special verdict was as follows: "Was the highway forming the approach to the north end of the bridge in a condition of insufficiency and in want of repair?" The court answered this question, for the jury, "Yes." This was error, for two reasons: (1) It condemns the *whole* or *entire* embankment as being insufficient and in want of repair. It was not material to inquire any further than that part of the embankment where the buggy went over it. (2) It was a litigated and disputed question of fact for the jury. The witnesses differed as to the width and length of the embankment, and as to its height. There were many things to be considered by the jury in passing upon this question. Is it certain that it ought to have been wider and longer, and that there ought to have been a railing on each side of the embankment, to make it a safe and suitable highway for *ordinary* travel? Did its width and length have anything to do with the accident? Here the team was *backing*, and not using the embankment in the usual manner. It was an unusual and extraordinary method of traveling. Was such a use of the embankment to have been expected or anticipated? Was the town bound to provide against it? The embankment was made by placing stumps and broken pieces of wood, and perhaps stone, as a foundation, and then covering it with earth until it was hard and smooth at the surface. It had sloping banks. How could a railing be placed on such an embankment? These are questions appropriate for a jury. The insufficiency of an ordinary highway is a question of fact for a jury, unless the evidence is all one way and the insufficiency clear and beyond question. We think the court erred in taking this

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question from the jury. *Kenworthy v. Ironton*, 41 Wis. 647; *McNamara v. Clintonville*, 62 Wis. 207; *Malloy v. Walker*, 77 Mich. 448; *Hill v. Fond du Lac*, 56 Wis. 246.

4. It seems that one John Cowie testified on behalf of the plaintiff on the former trial, and his testimony had been taken down by the reporter. During the closing argument of Mr. La Follette, one of the counsel of the plaintiff, he made the following statement and proposition: "John Cowie's testimony is in that book certified. You can't know what it is. It is not properly in evidence. [To defendant's counsel:] I will offer now, if Mr. Jones will agree, to have it read in evidence. He don't dare do it." The court said: "Oh, that is improper." The defendant's counsel excepted to the remarks of the plaintiff's counsel, and the court said: "It is entirely improper." Mr. La Follette: "We didn't call Mr. Cowie because they elected him a member of the town board of this town. It was a piece of fine work on the part of Mr. Doyle or some of them." This was objected to by defendant's counsel. The court said, "I presume it is proper;" and an exception was taken thereto. Mr. La Follette: "John Cowie was elected a member of the town board." This was also excepted to, and the court said: "That is proper. He swore to that himself." Mr. La Follette: "We could not call John Cowie and ask him what he testified to on a former trial. If he changed his evidence we would be bound by his testimony. But we did this — we called him to the stand, and asked the court if we could cross-examine him, under the rule you may cross-examine a party." This was also excepted to, and the court said: "They did that." This was an abuse of the privilege of counsel in presenting his case to the jury. It was a statement of facts not in evidence, for the purpose of influencing the jury. The remarks of the counsel which were disapproved by the court, and the colloquy between the court and the counsel, were both highly im-

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proper and exceptionable. The offer of counsel to cross-examine this Mr. Cowie was a matter of no concern to the jury, nor his election to the town board. Mr. Cowie's election to the town board since he testified for the plaintiff on the former trial is complained of before the jury as a special grievance and an unfair scheme to deprive the plaintiff of his testimony on the present trial. The counsel knew that the election to the town board of Mr. Cowie did not affect his competency as a witness. It was an unwarrantable imputation upon his honesty and integrity as a witness, which should not have been allowed as a reason for not calling him again as a witness, as well as foreign and extraneous to the case properly before the jury. We cannot but regard this as a material error on the trial of this case. *Brown v. Swineford*, 44 Wis. 282; *Baker v. Madison*, 62 Wis. 137; *Bremmer v. G. B., S. P. & N. R. Co.* 61 Wis. 114; *Sasse v. State*, 68 Wis. 530; *Waterman v. C. & A. R. Co.* 82 Wis. 613; and many cases elsewhere cited in appellant's brief.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

HOTSON, Respondent, vs. WETHERBY, imp., Appellant.

September 11 — October 2, 1894.

TAX TITLES. (1, 2) *Separate sale of several tracts: Recital in deed: Presumption.* (3, 7) *Recording of tax deed: Supplying omitted entry in index.* (4–6) *Issuance of deed on tax certificate: Limitation: Laches or abandonment of right.* (8) *Irregularities in prior proceedings: Limitation.*

1. A tax deed in the form prescribed by sec. 1178, R. S., reciting that several blocks (described therein and with the amount set opposite to each) "were, for the nonpayment of taxes, sold . . . for the sum of $80 *in the whole*, which was the amount of taxes assessed

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and due and unpaid on said blocks," etc., does not show that said blocks were sold for a gross sum,—the words "in the whole" meaning merely that the amounts, as stated in the certificate, opposite each block, and for which they were sold, aggregated $80.

2. A tax deed of several tracts is, without any recital on the subject, presumptive evidence that they were sold separately as prescribed by law.

3. It is not necessary to the validity of a tax deed that it should be recorded within the time limited by sec. 1182, R. S., for the issuance thereof.

4. Under sec. 1, ch. 112, Laws of 1867 (sec. 1182, R. S.), providing that the limitation of six years for the issuance of deeds on tax certificates shall not apply to certificates issued to or held by counties, or to their assigns, until six years from the date of their assignment by the county, the time limited does not begin to run from the mere acceptance by the county of a bid for the certificates, not amounting to an assignment *in præsenti*.

5. Sec. 32, ch. 22, Laws of 1859 (sec. 1187, R. S.), providing that no action by the grantee in a tax deed to recover possession of the land should be maintained unless brought within three years after the recording of the deed, cannot be construed as prescribing any limitation in respect to tax certificates or the issuance of deeds thereon.

6. In the absence of any statutory bar upon the issuance of a deed upon a tax certificate, or of any presumption of payment or redemption which might arise after the lapse of twenty years or after long-continued adverse possession, the evidence of abandonment or laches must be clear and decisive to have the effect of depriving the holder of the certificate of his right to a deed thereon.

7. Where the description of the land affected by a tax deed was not entered upon the general index at the time the deed was spread upon the record, the subsequent insertion, in the place for such description, of the words "See record" makes the record complete and operative from the time of such insertion, if the index correctly refers to the volume and page where the deed is recorded at length.

8. Under sec. 1188, R. S., a tax deed, fair on its face and properly recorded more than three years before the commencement of the action, cannot be impeached by evidence of defects or irregularities in the tax proceedings prior to its execution.

APPEAL from the Circuit Court for *Douglas* County.

The respondent filed a petition in the circuit court for Douglas county, in the matter of the proceedings of the

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Northwestern Coal Railway Company, for the condemnation of block 42 on East St. Croix street in the city of Superior for railway purposes, claiming that the sum of $1,500, paid into court by the company as compensation for taking said premises, should be paid over to him as the owner thereof; and he made the appellant and one Burhans parties to his petition, on the ground that they severally claimed said premises and said fund. Burhans made no contest of the respondent's claim, but the appellant, *Wetherby*, answered, setting up that he was the owner of the patent title, and claiming that the title asserted by the respondent under and through a tax deed to Annette Relf was void and of no effect, for reasons fully set forth in his answer.

It was admitted that the appellant was the owner of the patent title, and that the respondent was the owner of whatever title to the premises passed by the tax deed to Annette Relf; and it appeared that up to the time of the hearing the block in question was vacant and unoccupied. The tax deed was executed January 3, 1876, and recorded on the 7th of the same month; but the entry of the deed in the index of the record thereof was imperfect, in that the blocks affected by the instrument were not described under the proper head. It so remained until some time not earlier than 1882 nor later than 1886, when the register of deeds added, in the place for such description, after the words "Blocks in Superior," the words "See record;" the volume and page where the deed was in fact recorded at length then appearing on said index. The respondent relied on the three years statute of limitations having made his title under the tax deed perfect. It was admitted that there had been no redemption made or attempted from the tax sale mentioned in the deed. To the admission in evidence of the tax deed, it was objected, among other things: (1) That it was not fair on its face; (2) that it was issued more than sixteen years after the tax-sale purchaser had

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forfeited his right to a deed by lapse of time and by the statute of limitations; (3) that it was not executed and acknowledged so as to entitle it to be recorded; (4) that it was not recorded until after the right to record it expired; (5) that the record was not sufficiently indexed. These objections were overruled.

The appellant, on his behalf, offered in evidence the record of the board of supervisors of Douglas county, showing that on December 31, 1869, the board opened and considered the bids for the tax certificates belonging to the county, when the bid of one Moore was accepted, offering "to pay for all certificates remaining unredeemed the sum of twenty cents on the dollar, for the face of said certificates," etc., "and, as a guaranty of good faith, will deposit $200 with the clerk of the board, the balance to be paid on delivering of said certificates to me, after being examined and itemized by said clerk." The certificate on which the deed was issued was offered in evidence, with the indorsements thereon, showing that the sale was made to Douglas county, and the certificate was dated September 13, 1859. It was indorsed as follows: "This certificate assigned to I. I. Moore, January 19, 1870, at twenty cents on the dollar," etc. "Richard Relf, Clerk of the Board of Supervisors;" and another, "Deeded to Annette Relf," to whom it was shown that Moore had assigned the certificate. Evidence to show that the proper notice of the tax sale was not given, nor of the expiration of time for redemption of the premises, was offered; but all proof of defects in publishing and posting said notices was excluded, on the ground that the statute of limitations had barred such inquiries.

The court found that the title of the respondent was perfected and complete under the statute of limitations, R. S. sec. 1188.

For the appellant there were briefs by *Pickering & Hartley* and *True & Neal*, and oral argument by *W. T.*

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Hartley. They contended, *inter alia*, that under secs. 18, 25, ch. 22, Laws of 1859, a tax deed was due the purchaser at the end of three years from the date of sale, on surrender of the certificate. Failure to surrender the certificate and demand a deed after a reasonable time will be construed as an abandonment of the purchase and a forfeiture of the rights acquired thereby. *Ockendon v. Barnes*, 43 Iowa, 615; *Kipp v. Hill*, 40 Minn. 188. That the county was purchaser and held the certificate for more than ten years after the sale could make no difference, for it had the same opportunity to have a deed if desired as would an individual. Under sec. 32, ch. 22, Laws of 1859 (sec. 1187, R. S.), if the purchaser obtained and recorded his tax deed when it was due to him, he could bring no action thereon unless it was brought within three years from that date, or six years from the date of the tax sale. He could not by his own laches extend the time of that statute of limitations in his own favor. And if he neglected to get a deed and have it recorded so that his action for possession was maintainable before the period of that limitation expired, he was barred from taking such steps at any future time, and must be held by his own laches to have abandoned his purchase and forfeited every statutory right acquired. *Hintrager v. Hennessy*, 46 Iowa, 600; *Bailey v. Howard*, 55 id. 290; *Griffith's Ex'rs v. Carter*, 64 id. 193; *Hintrager v. Traut*, 69 id. 746; *La Rue v. King*, 74 id. 288; *Innes v. Drexel*, 78 id. 253; *Stewart v. M. & St. L. R. Co.* 36 Minn. 355. If not by the three year limit of the law of 1859, then certainly by the six year limit of ch. 112, Laws of 1867 (now in sec. 1182, R. S.), the making and recording of the tax deed in question was barred because it was not made within six years from the contract of purchase from the county, and because, not having been properly indexed, it was not recorded within six years from the date of assignment of the certificate, as required. *Shove v. Larsen*, 22 Wis. 142;

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Lombard v. Culbertson, 59 id. 433. Our position is that the deed must be recorded as well as made by the expiration of the six years here mentioned. Otherwise the act affords no protection to the former owners or any other person, and would have no beneficial effect. A tax deed has no valid effect until recorded. Action does not lie against the holder until it is recorded; no action can be begun by him to recover the property until it is recorded; and the right of redemption continues, the same as though no deed was made, until it is recorded. So, for all effects and purposes the recording of a tax deed is essential to its validity; and the recording was clearly within the intent of said legislative action. If not by the three years limit of the law of 1859, or the six years limit of the law of 1867, then certainly by the fifteen years limit of ch. 87, Laws of 1877 (now in sec. 1182, R. S.), the recording of the tax deed in question was barred. This position is also based upon the proposition that the deed must be properly recorded as well as made by the expiration of the time named. The record of the deed in question was not properly indexed within the fifteen years next after the tax sale, nor until after the said act of 1877 went into effect. *Goffe v. Bond*, 69 Wis. 366. After the deed had been once recorded, the register had no authority to alter or correct the same, and certainly not to insert matter of correction without memoranda showing by whom made. Such action would tend to destroy rather than help the attempted record of an instrument. *Elliott v. Piersol*, 1 Pet. 341; *Foster v. Dugan*, 8 Ohio, 87; *Farmers' & M. Bank v. Bronson*, 14 Mich. 361; *Burton v. Martz*, 38 id. 762; *Jennings v. Dockham*, 99 Mich. 253.

D. E. Roberts, for the respondent.

PINNEY, J. The principal objections made to the respondent's title are laches in taking and recording the tax

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deed, and that, by abandonment of the purchase, all rights under the certificate of sale were lost before the deed was issued; that it was not properly recorded so as to give constructive notice of its existence and afford a basis for the statute of limitations of three years; and that the issue of the deed had been barred by the statute before its date, and that the completion of the index entry of the registry of the deed was void and inoperative, and, until lawfully recorded, the deed was wholly void and ineffectual.

1. The tax deed is in the form prescribed by the statute (sec. 50, ch. 22, Laws of 1859; R. S. sec. 1178), and the objection that it shows on its face a sale of the thirty or more blocks included in it for a gross sum of $80 is not maintainable. The recital is that these several blocks (describing them, and set opposite each the amount) "were, for the nonpayment of taxes, sold by the treasurer of said county, at public auction, at," etc., "on," etc., "to the said Douglas county, for the sum of $80 *in the whole, which was the amount* of taxes assessed and due and unpaid on said blocks," etc.; and is in strict conformity with the statutory form. The words "in the whole" mean in this connection, not that the blocks were sold in gross, but that the amounts, as stated in the certificate, opposite each block, and for which they were sold, aggregated $80. It was not necessary to expressly recite that the blocks were sold separately, and, as it does not appear that they were sold in gross, the deed is "presumptive evidence of the regularity of all the proceedings, from the valuation of the land by the assessor up to and including the execution of the deed," and hence was evidence that the several blocks were separately sold, as prescribed by law. Laws of 1859, ch. 22, sec. 25 (R. S. sec. 1176). The tax deed, when delivered, was perfect and passed or might pass the legal title. The section referred to provides that the deed "may be recorded with like effect as other conveyances of land."

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We have not been referred to any statute, nor are we aware of any, that makes recording of the tax deed essential to a complete and valid conveyance, though important advantages may result from its registration, as is the case in respect to other conveyances.

2. The block in question was sold at the tax sale, September 13, 1859, to Douglas county, and the certificate of such sale was transferred to one Moore, January 19, 1870, and subsequently to Annette Relf, the respondent's remote grantor, to whom the tax deed in question was issued January 3, 1876, and it was filed for record and recorded imperfectly, as it appears, January 7, 1876. The right to have a tax deed issued on the certificate was not barred by the six years statute of limitations (sec. 1, ch. 112, Laws of 1867, as amended and embodied in R. S. sec. 1182), for the reason that the county continued to own and hold the certificate until January 19, 1870; and the deed in question was issued and delivered within six years after the date of the assignment of the certificate to Moore. The acceptance by the county board, December 31, 1869, of Moore's bid for the tax certificates owned by the county, did not amount to an assignment of them *in præsenti*, but amounted to an executory agreement to thereafter assign them. By the agreement, Moore was to pay the county twenty cents on the dollar on the face of the certificates, taxes, and redemption printing, and to deposit $200 with the clerk as a guaranty of good faith, and the certificates were to be examined and itemized by the clerk of the board,— that is to say, the amount to be paid for them was to be ascertained,— and the balance of the purchase price was to be paid, and the certificates thereafter assigned and delivered to Moore; and it appears that the transfer to him was not made until January 19, 1870. The tax deed in question was issued January 3, 1876, within six years after such assignment of the certificate; so that neither the limitation of six years

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nor that of fifteen years, prescribed by the statute referred to, is applicable to the case, although the tax deed was not lawfully recorded until after the period of fifteen years from and after the date of the tax sale. It is plain that sec. 32, ch. 22, Laws of 1859 (R. S. sec. 1187), does not prescribe any limitation in favor of or against tax certificates of sale. Its entire operation is plainly confined to tax deeds, and any other conclusion would not be within the legitimate limits of construction.

3. We do not think that the appellant's contention that the right to a tax deed on the certificate in question had been lost by laches or abandonment is tenable. Without considering the question whether the common-law presumption of payment or redemption would not arise in such a case after the lapse of twenty years, or whether such presumption might not arise after long-continued adverse possession of the premises, we are clear that, independent of any such considerations, the evidence of abandonment or laches must be clear and decisive to have the effect contended for by appellant's counsel. The certificate in question was a part of the property of Douglas county, and before eight years after its date had expired the statute (ch. 112, Laws of 1867) was enacted, inaugurating a new policy, by which limitations of six and fifteen years upon the issue of tax deeds on certificates of sale were prescribed. This act plainly contemplates that counties or municipal corporations might thereafter sell and assign any tax certificates they then owned, and that the right to have a tax deed issued on them should not be barred until six years after such assignment. It is conceded that the owner of the patent title has never redeemed, or offered to redeem, the premises, and he cannot point to any limitation that has extinguished his duty or liability to redeem or lose his land. There is no ground, we think, to impute laches or abandonment on the part of the county, such as

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to operate to bar its rights; and it is clear that there has been no laches or evidence of abandonment on the part of its assignees. In *Eaton v. North*, 32 Wis. 303, a tax deed void on its face had been issued on a sale made twelve years previously, and no action had been taken by the claimant under it to obtain a valid deed until fifteen years after the date of the first deed; but it was held that his right to a valid deed had not been impaired or lost by lapse of time, and that there was no statute or common-law rule which could be applied, even by analogy, to cut off his rights. The policy and legislation of the several states on questions of taxation and the sale and conveyance of lands for taxes vary materially, and are necessarily of local application; and though counsel for the appellant cited several Iowa decisions which seemed to sustain his contention on this point, for reasons already stated we must regard the question in this state as one not open for discussion.

4. Although the register of deeds did not properly record the tax deed of January 7, 1876, his duty to do so was of continuing obligation; and it is well settled that an omission to make proper entries in the general index at the time the deed is spread upon the record may be remedied after such recording by making the proper entries, and, when so made, the record will be good from that date, and it will not be necessary to again record the deed at length. *Lombard v. Culbertson*, 59 Wis. 442; *Oconto Co. v. Jerrard*, 46 Wis. 317. The insertion of the words "See record" in the index, under the column for description of the premises conveyed, was made by the register of deeds between 1882 and 1886; and the reference to the volume and page made the record complete and operative from the time of such insertion. *St. Croix L. & L. Co. v. Ritchie*, 73 Wis. 409; *Hall v. Baker*, 74 Wis. 118; *Lander v. Bromley*, 79 Wis. 372; S. & B. Ann. Stats. sec. 759*a*.

5. As the tax deed under which the respondent claims

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title is fair on its face and was properly recorded more than three years before the commencement of this action, the appellant's claim of title was barred by the three years statute of limitations on the tax deed (R. S. sec. 1188); and the evidence offered by appellant to impeach the tax deed, showing defects and irregularities in the tax proceedings prior to its execution, was properly excluded. The respondent's title under the tax deed, according to repeated decisions of this court, was absolute and conclusive, and he was lawfully entitled to the money paid into court under the condemnation proceedings.

By the Court.—The order of the circuit court is affirmed.

LISTMAN MILL COMPANY, Respondent, vs. WILLIAM LISTMAN MILLING COMPANY, Appellant.

September 11 — October 2, 1894.

Trade-marks: Flour brand: Transfer with business: Infringement: Injunction.

1. The word "Marvel," used in a flour brand to designate the output of a certain mill, is a valid trade-mark.
2. The trade-mark "Marvel," which had been used by a firm to designate the output of its flour mill, was registered in the name of L. one of the partners, who "originated" it. Its use was continued by the firm and by a corporation which succeeded the firm in the operation of the mill, and also by the plaintiff corporation, which purchased the site and erected a new mill after the burning of the old one. L. owned practically all the stock of the former corporation when the business was transferred to the plaintiff, and was largely interested in the latter and was its general manager for four years. He then sold his interest in the plaintiff, and became the president and general manager of the defendant corporation, which thereafter used the trade-mark "Marvel" upon the product of its mill, situated in another city. *Held*, that although there had been no express transfer of the trade-mark, the exclusive right to its use had passed to the plaintiff.

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3. The use of the distinguishing feature of plaintiff's trade-mark in combination with others, constituting a trade-mark or brand so similar in appearance as probably to deceive customers or patrons of plaintiff's trade or business, will be restrained by injunction, although it is not shown that any one has in fact been deceived or that there has been intentional fraud.

APPEAL from the Circuit Court for *Douglas* County.

This is an appeal from an order denying a motion to dissolve a temporary injunction. The question involved is the title or right of the defendant to use a trade-mark or label as a distinctive mark of the flour manufactured by it.

The facts are substantially undisputed. In December, 1880, William Listman, as a general partner, and three other residents of La Crosse, as special partners, organized a limited partnership for the manufacture of flour in the city of La Crosse. The partnership then acquired a mill site and mill, the title to the real estate remaining in William Listman, who had owned it before. The partnership at once commenced the manufacture of flour to which the trade-mark "Marvel" was uniformly applied. The limited partnership, originally organized for three years, renewed several times, continued to about the month of December, 1887, when a corporation, the William Listman Mill Company, was formed. During all this time the same brand was put on the product of the mill. It seems that prior to the organization of this limited partnership the same mill was operated by a firm named White, Listman & Co., and that either this firm or William Listman personally applied the "Marvel" brand to its product as early as September, 1880. In December, 1887, the William Listman Mill Company was organized, Mr. Listman and his late special partners becoming interested in the corporation. To this corporation the legal title to the real estate was conveyed. It took possession of, and thenceforth operated, the mill, placing the brand "Marvel" upon all its

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product. The mill continued to be so operated by this corporation until May, 1889, when it was destroyed by fire. It seems that after this fire Mr. Listman purchased of the other two stockholders their stock in the corporation, but the corporation was not dissolved, each of the retiring stockholders retaining a nominal holding at Mr. Listman's request.

The plaintiff company was organized July 2, 1889, and Mr. William Listman became a large stockholder in the same. The other stockholders were new men. To this corporation the mill site was conveyed, through Mr. William Listman. The corporation erected a new mill on the premises, which was ready for work by October, 1889. For four years, until the 1st day of October, 1893, William Listman was secretary and treasurer and general manager of the plaintiff corporation so manufacturing flour at said mill. During all that time all, or substantially all, the flour manufactured at this mill was marked and branded with the trade-mark "Marvel." The answer attempts to deny that all the flour manufactured at the mill was so branded, but it carefully refrains from stating from how much or from what proportion of the product it was omitted. It also appears that this trade-mark was carried on the letter heads and advertisements of the plaintiff corporation. When the new mill was about to start up the plaintiff issued a circular to the trade. It is dated "La Crosse, Wis., October 1st, 1889." It states that on May 1st the old mill had been completely destroyed by fire, then speaks in terms of commendation of the new mill with improved appliances which had been erected in its place, and adds: "We shall start on or about October 5th, and guaranty our new Model Mill to be capable of and will turn out the very best patent flour, manufactured from Minnesota and Dakota hard spring wheat, in the country, thereby sustaining the high standard of our 'Marvel.'" It closes

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with an appeal for patronage, and is signed "*Listman Mill Co.*" Upon its face is an impress of the "Marvel" trade-mark.

It is conceded that William Listman "originated" the trade-mark, and that in 1884 he registered the same in the patent office of the United States in his own name, without disclosing any other party as interested; also, that no formal transfer of this trade-mark has ever been made by William Listman. The record contains no competent evidence of any express agreement ever made concerning this trade-mark. In his application for registration, Mr. Listman described the place and position of the different words on the disk, including his name, "William Listman," and adds, "But any and all such words may, except the word 'Marvel,' be omitted or changed at pleasure without materially altering the character of my trade-mark, the essential feature of which is the word 'Marvel,' in large, ornate capitals, as aforesaid."

In August, 1893, the defendant corporation was formed and commenced the erection of a mill at Superior, which was ready for operation the latter part of September, 1893. About the 1st of October, 1893, Mr. William Listman severed his connection with the plaintiff company, and became president and manager of the defendant company. After that the defendant placed the brand and used the trade-mark "Marvel" upon, and to advertise, the product of its mill.

For the appellant there were briefs by *Catlin & Butler* and *A. C. Paul*, and oral argument by *Mr. Paul*. They contended, *inter alia*, that the mere use of the brand by the partnership on flour made and sold by it, such use being with the consent and under the direction of Listman, did not operate as a transfer of the brand to said firm. *Kidd v. Johnson*, 100 U. S. 617; *George T. Stagg & Co. v. Taylor*, 27 S. W. Rep. 247; Browne, Trade-Marks, § 364; *Huwer v.*

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Dannenhoffer, 82 N. Y. 499; *Hazard v. Caswell*, 93 id. 259; *McCardel v. Peck*, 28 How. Pr. 122–124; *Howe v. Searing*, 6 Bosw. 354; *Stetson v. Winsor*, 9 Phila. 513. After the incorporation of the William Listman Mill Co., Listman continued an officer thereof and managed its business, and used this flour brand just as he had used it in the business of the special copartnership, for the purpose of showing to the trade that *he* was the miller of the flour upon which this brand was used. The use by the corporation of the flour brand without any agreement or transfer to it would no more give the corporation title to the flour brand than the use by the special copartnership of the same flour brand would give said copartnership title to it. After the incorporation of the plaintiff company, Listman began the use of this brand in the company's business, and continued to use it until he withdrew from the company four years later. Under the above authorities, the most that plaintiff had in this brand was a license to use it. See, also, *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. 599, 615. If the plaintiff did acquire the good will of the former partnership, or of the special copartnership, and thereby the right to use the flour brand, it cannot claim, in the absence of an express agreement, the exclusive right to use such brand. *Fish Bros. Wagon Co. v. La Belle Wagon Works*, 82 Wis. 546. The word "Marvel" was used to denote the grade, kind, or quality of the article, not its origin, manufacture, or ownership, and hence was not capable of being exclusively appropriated as a trade-mark. *Columbia Mill Co. v. Alcorn*, 150 U. S. 460; *Larabee & Co. v. Lewis*, 67 Ga. 561; *Colgon v. Danheiser*, 35 Fed. Rep. 150; *Taylor v. Gillies*, 59 N. Y. 331; *Gray v. Koch*, 2 Mich. N. P. 119; *Brown Chemical Co. v. Stearns*, 37 Fed. Rep. 360; *Brown Chemical Co. v. Meyer*, 139 U. S. 540; *Rumford Chemical Works v. Muth*, 35 Fed. Rep. 524; *Choynski v. Cohen*, 39 Cal. 501; *Ayer v. Rushton*, 7 Daly, 9; *Carbolic Soap Co. v. Thompson*, 25 Fed. Rep.

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625; *Town v. Stetson*, 5 Abb. Pr. (N. S.), 218; *Caswell v. Davis*, 58 N. Y. 223; *Hegeman v. Hegeman*, 8 Daly, 1; *Alden v. Gross*, 25 Mo. App. 123; *Van Beil v. Prescott*, 82 N. Y. 630; *Ball v. Siegel*, 116 Ill. 137.

For the respondent there were briefs by *George H. Gordon*, attorney, and *Winkler, Flanders, Smith, Bottum & Vilas*, of counsel, and oral argument by *Mr. Gordon* and *F. C. Winkler*. They argued, *inter alia*, that use is the source of title in trade-marks. *William Rogers Mfg. Co. v. Rogers & Spurr Mfg. Co.* 11 Fed. Rep. 495; *Shaw Stocking Co. v. Mack*, 12 id. 707, 714; *Atlantic Milling Co. v. Robinson*, 20 id. 217; *Trade-Mark Cases*, 100 U. S. 82, 92, 94. Generally speaking, on purchasing an establishment without special mention of trade-marks, brands, and labels which have been used in connection with it, the purchaser becomes entitled to their use. *Pepper v. Labret*, 8 Fed. Rep. 29; *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep. 217; *Morgan v. Rogers*, 19 id. 596; *Kidd v. Johnson*, 100 U. S. 617; *Fish Bros. Wagon Co. v. La Belle Wagon Works*, 82 Wis. 546, 562; *Merry v. Hoopes*, 111 N. Y. 415. Upon the formation of a partnership with a person entitled to a trade-mark, the trade-mark, in the absence of express provisions in relation to it, becomes an asset of the partnership. Browne, Trade-Marks (1st ed.), § 362; *Sohier v. Johnson*, 111 Mass. 238; *Filkins v. Blackman*, 13 Blatchf. 440; *Bury v. Bedford*, 4 De G., J. & S. 352; *Menendez v. Holt*, 128 U. S. 514. The word "Marvel," being neither the description of an ingredient nor an adjective of quality, constitutes a good trade-mark. *Braham v. Bustard*, Cox, Manual of Trade-Mark Cases, No. 226; *Dixon v. Jackson*, id. No. 271; *Faber v. Hovey*, id. No. 481; *Rowley v. Houghton*, id. No. 301; *Alleghany Fert. Co. v. Woodside*, id. No. 364; *Ford v. Foster*, L. R. 7 Ch. App. 611; *Waterman v. Shipman*, 130 N. Y. 301; *Royal Baking Powder Co. v. Royal Chemical Co.* Cox, Manual of Trade-Mark Cases, No. 656.

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NEWMAN, J. Only such names, words, and devices as may be held to be adapted to point out the true source and origin of the goods upon which such marks are used can constitute valid trade-marks. Such words as are merely descriptive of the kind, nature, character, or quality of the goods cannot be exclusively appropriated and protected as a trade-mark. But a valid trade-mark may consist of some novel device, arbitrary character, or fancy word, applied without special meaning, which by use and reputation comes to serve the same purpose. Such words and devices are held to indicate sufficiently the true source and origin of the goods, without particular addition of the name of the manufacturer or dealer. *Dunbar v. Glenn*, 42 Wis. 118; *Marshall v. Pinkham*, 52 Wis. 572; *Gessler v. Grieb*, 80 Wis. 21, and cases cited; *Fish Bros. Wagon Co. v. La Belle Wagon Works*, 82 Wis. 546. The word "Marvel," used in the plaintiff's flour brand, is such an arbitrary or fancy word. It is not, in any true sense, descriptive of any characteristic or quality of the goods which it is used to designate, but rather indicates their origin or ownership. It is very much like the word "Bethesda," used to designate the water of a certain spring in Waukesha county, which was held to be a valid trade-mark in *Dunbar v. Glenn*, 42 Wis. 118. It is used by the plaintiff in a similar way to designate the output of its mill. As was said in that case, the word seems to have been adopted to indicate origin or ownership, and to have a name by which the product of the mill could be distinguished when bought and sold in the market. As was said in *Filley v. Fassett*, 44 Mo. 168, this word was the prominent, essential, and vital feature of the trade-mark. The goods were known by this word itself. It constitutes a valid trade-mark, such as equity will protect.

Title to a trade-mark is acquired and retained by appropriation and use. While William Listman owned and con-

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ducted the business, this word was a part of his trade-mark,—the distinguishing and essential feature; while the business was conducted by a copartnership, it was the trade-mark of the copartnership; and, when the same business was done by a corporation, it was the trade-mark of the corporation. Through all these changes of ownership of the plant and business it continuously designated the output and product of the same mill. It did not cease to be the trade-mark, to designate its output of flour, when or because Listman sold his stock in the corporation and ceased to have an interest in the business. It had been appropriated and used to designate and give a name to the product of the same mill and business, by which it was known in the market through all these successive proprietaries, and during all this time it had not been used to designate any article of which Listman himself was sole proprietor.

Listman seems to have owned virtually the entire plant and business at the time when he conveyed to the corporation. He says that it was not understood that the title to the trade-mark passed by that conveyance. This seems to mean that nothing was said about it. There was no agreement that it should pass. Under such circumstances it is a question of law whether it did pass. Listman was one of the promoters of the corporation. He conveyed to it the mill site, with the business and good will,—at least, all the title he had in it. Ordinarily the good will of a business passes by a conveyance of the place where the business has been carried on, without special mention. The purchaser who acquires such good will takes with it the exclusive right to the use of such trade-marks as have been up to that time in use in the business, without mention of them in the contract of sale. 17 Am. & Eng. Ency. of Law, 1187, and cases cited in the notes; *Fish Bros. Wagon Co. v. La Belle Wagon Works*, 82 Wis. 546, and cases cited on page 562; *Shipwright v. Clements*, 19 Wkly. Rep. 599;

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Brass & I. W. Co. v. Payne, 50 Ohio St. 115. Many of the cases are where one partner sells out to the other partners. It cannot be less clear when a mere stockholder in a corporation transfers his stock, for a mere stockholder has no title in the corporate property. So it seems right to hold that, whatever property Listman may have had in this trade-mark at some earlier date, none remained to him after he ceased to be a stockholder in the plaintiff corporation.

The defendant has used this word "Marvel" as a part of its flour brand or trade-mark against the plaintiff's protest and objection. It has used it in combination with other words, so as to constitute a brand or trade-mark so similar in appearance to the plaintiff's that the difference might easily pass without observation to casual observers. The plaintiff complains only of its use of the distinguishing word "Marvel." In order to support the action the imitation of the trade-mark need not be exact or perfect. It may be limited and partial. Nor is it requisite that the whole should be pirated. Nor is it necessary to show that any one has in fact been deceived. Nor is it necessary to prove intentional fraud. If the court sees that the plaintiff's trade-marks are simulated in such a manner as probably to deceive customers or patrons of its trade or business, the piracy should be checked at once by injunction. *Filley v. Fassett*, 44 Mo. 178, and cases cited. It is a proper case for the issuance of an injunction.

By the Court.— The order of the circuit court is affirmed.

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DOUGHERTY, Respondent, vs. WEST SUPERIOR IRON & STEEL COMPANY, Appellant.

September 11—October 2, 1894.

Master and servant: Personal injury: Contributory negligence: Court and jury: Assumption of risk: Command of foreman.

1. In an action for personal injuries, where contributory negligence was alleged in the answer and the question was largely one of inference from the facts in evidence, the failure to submit that question to the jury was a material error.
2. Plaintiff, an employee of defendant, was injured while making cores to be used in casting iron pipe, by having his hand caught in hay which he was putting upon a revolving spindle driven by steam. Upon the evidence—showing, among other things, that he was twenty-eight years old, and was familiar with the way in which the work was done, and had worked for the defendant about fifteen months in making cores upon a machine run by hand; that the velocity of the spindle driven by steam was not materially greater than that of those turned by hand; and that the danger of having his hand caught was obvious—it is *held* that such injury was one of the ordinary risks of the employment assumed by the plaintiff, and hence that he cannot recover for the injury.
3. The fact that plaintiff had objected to working on the spindle driven by steam, and had done so only because told by defendant's foreman to "go there or get out," does not obviate the objection to a recovery, founded on plaintiff's assumption of the risk.

APPEAL from the Circuit Court for *Douglas* County.

This action was brought by the plaintiff to recover damages sustained by him while in the defendant's employ, in and about its steel works, in making cores to be used in casting iron water pipes. The claim in the complaint, in substance, is that he was employed to work in making special cores by hand power, and that Burns, the manager and foreman of said works, and having power and authority over the defendant's employees to hire and discharge them at pleasure, negligently and carelessly commanded him to work at a machine for making cores, run by steam

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power, which was dangerous and unsafe in that the party working on it was liable to have his hands caught by hay which he was obliged to feed and hold so that it might be wound around a spindle revolving with great velocity, and thereby be broken; that Burns knew the dangerous character of the machine, and carelessly and negligently failed and neglected to inform the plaintiff thereof, though Burns knew the danger and appreciated the risk to which he exposed the plaintiff; that it was a more dangerous machine than the one on which he had been employed, and from which he was taken; that the plaintiff was ignorant of the dangerous character of the machine, and inexperienced at that class of work, and did not know or appreciate the danger or risk incident thereto; that he went to work as directed, and after working about two hours, and while in the exercise of due care, and without any fault or negligence on his part, his right hand was caught in the machine and wound around the spindle, and both bones in his forearm were broken, etc., to his damage. The defendant denied most of the allegations of the complaint, and alleged that the plaintiff was injured by reason of his careless and negligent conduct, and without fault, carelessness, or negligence on the part of the defendant.

It appeared at the trial that the plaintiff, after working about the defendant's works four or five months, was put to work making special cores about October, 1890. He had to "hay" the iron spindles, which were about four feet long, and the cores were of four, six, eight, and ten inches in diameter. The spindles were placed on iron trestles set at each end, and were turned by hand by means of a crank on one end, and he put the hay on while they were in motion. For anything over six inches the hay was put on in ropes. The one "haying" the spindle took the hay between his legs, and put it on, going right along with it the length of it, while the man was turning the spindle. Burns,

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defendant's foreman, told him he wanted him to go and work with Adams on the end of the six-inch gang, where the spindles were made to revolve by steam power, in the building called the "core sheds," and they "roped" thirty eight-inch spindles that morning, and commenced to "hay" six-inch spindles. He testified: "I started to work on the end of the spindle, and Adams in the middle of it, and I got the hay around it when the spindle was going around. I put the hay on, and put my hand out to get it bound after it had gone around, and it caught my hand and drew it right in and broke my hand in two places. Burns did not give me any instruction in reference to it,—how to work it. I didn't know while working at that machine that it was dangerous; didn't know that my hand was liable to be caught and drawn in by the hay while the spindle was revolving; wasn't aware nor did I appreciate any danger while working at that machine, nor at any other time. I objected to going to work on the machine when he ordered me to do so; told the foreman I didn't understand the work and I thought it was too heavy for me. We had to carry the six-inch spindles and handle the mud, and I thought it was too heavy for me, and I told him I thought I couldn't do the work. He said to me, 'Either go there or get out.' The spindle doesn't come in contact with any other object. You keep your hand on top to keep the hay on until it catches, and go right along and put on a little at a time until you get it covered. After the hay catches there is a certain impetus. As the spindle turns around you get the hay on it. There is a 'strike,' which is a board where you put the mud on. It is the same kind of a 'strike' used in making special cores. I know of the machine used in making special cores. It is not the same kind of machinery that I was working on the day I was injured, but it is the same in shape." It was shown that the board called a "strike" was supported by

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the trestles on which the spindle rested, and was on the opposite side from where the man stood while "haying" the spindles for six-inch cores, and was used to put mud on the cores after they had been properly "hayed."

The plaintiff, when injured, was twenty-eight years of age, and had worked at a foundry in New Jersey seventeen months, where he testified that they made a vast amount of pipe in the same way as in the defendant's plant; and he worked at making and "haying" special cores about fifteen months before he was hurt, March 18, 1892, on a machine turned by hand; and that they made cores on the spindles run by steam about the same way they made special cores. The spindles revolve in the same general way as when run by hand, only faster, that was all. In making cores by hand he had to stop until he would get the hay wound around the spindle and fastened, and then would tell the man that turned it to go ahead. "When I got hurt I put the hay around the spindle, and it had caught and was revolving quite rapidly, and I was distributing the hay. My hand got caught in the hay, and it drew my hand over and down to the 'strike.' The left hand was on top of the spindle, and the right under it. My hand was drawn in from underneath. My arm was broken before it came to the 'strike.' I knew that the spindle was revolving at the time." He further testified that in "roping" cores that morning he put the rope on the spindle while in motion, and the rope was put on in the same general way the hay was; that he did not then know whether it was safer to fasten the hay before the spindle started or not, and he had not worked in the building before that morning where the spindles were run by steam.

Evidence was given on the part of the plaintiff showing that no instructions were given him as to how to do the work; that when the spindle is turned by hand the operator can call to the one who turns, and stop it, if he gets

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his fingers caught; that when turned by steam it is stopped by treadles on the side where the "strike" is, but in "haying" six-inch cores he stands where there are no treadles within reach with which to stop it; that there was nothing wrong about the machine; that when run by steam the spindles ran sometimes faster and sometimes slower than when run by hand; that in using steam power there is a slow movement and a fast movement, the slow movement being uniform, and the fast nearly so; and that there are times when the movement by hand is faster than the fast movement by steam, but it would not hold out so long.

After the plaintiff rested the defendant moved for a nonsuit, which was denied. At the close of the evidence the defendant asked the court to direct a verdict in its favor, but this was refused. In answer to questions submitted the jury found that the plaintiff did not have sufficient experience in the kind of employment he was engaged in when injured to enable him, by the exercise of ordinary care and diligence, to know and appreciate the dangers incident thereto; that the accident was the result of the usual and ordinary risks thereof; that he did not comprehend them, and did not have reasonable means of knowledge thereof; that there was a want of ordinary care on defendant's part in setting him at work without informing him of the risk incident to such work; that this was the proximate cause of the accident; and that there was no want of ordinary care on the *defendant's* part that contributed to produce the injury he received. No instructions were given to the jury on the subject of contributory negligence on the part of the plaintiff, but there was an instruction given, probably intended for that purpose, but it was rendered of no effect by the use of the word "defendant" for that of "plaintiff," as in the last part of the special verdict. After the jury had been discharged the court requested defendant's attorneys to consent to the reassembling

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of the jury and the submission of the question of contributory negligence, but consent was refused. The motion for a new trial was denied, and the plaintiff had judgment for the damages awarded, $10,000, from which the defendant appealed.

For the appellant there was a brief by *Ross, Dwyer & Hanitch*, and oral argument by *W. D. Dwyer.*

John Brennan, for the respondent.

PINNEY, J. 1. The defendant insisted by its answer that the plaintiff's injury was caused by negligence on his part contributing to the result, and as the question of negligence on the part of either party to such actions as the present is often, as in this case, largely one of inference from the facts in evidence, the court should, we think, have submitted to the jury the question whether the plaintiff was guilty of negligence on his part contributing to the injury of which he complains. That the jury were not instructed on this point, and that there was no finding upon it, seems to have been the result of inadvertence; but the absence of such a finding is an error, in the state of the record before us, that is fatal to the judgment and renders its reversal necessary.

2. The case was fully argued on the merits, and as it is probable that the evidence on another trial will not be materially different from that now presented, it is manifestly proper to consider the question whether the case should have been submitted to the jury at all. It is perfectly obvious, as found by the jury, "that the accident was the result of the usual and ordinary risks of the employment he was engaged in," and equally so that in the exercise of common sense and ordinary prudence he must have known and appreciated the risk of the employment, and therefore must be held to have assumed such risk upon entering upon the work in which he was engaged when injured. He was

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at the time twenty-eight years of age, and we must assume that he was a person of ordinary intelligence; and it appears that he was familiar with the manner in which the work was performed, having observed it for a considerable time in a like manufacturing plant in New Jersey, where he says the work was performed as in the defendant's plant. He had, besides, worked at making cores for sixteen months or more for defendant where the spindles were turned by hand, and had observed somewhat the way in which they were made when turned by steam. He does not claim that he was ignorant on this subject. It is simply preposterous and incredible that, with his knowledge and experience, he did not know that his hand was liable to be caught and drawn in by the hay he was feeding while the spindle was revolving. The facts open to the most casual inspection were sufficient to admonish a person of ordinary intelligence of such danger. It may be that he meant to convey the idea that his hand was *unexpectedly* caught in the hay and drawn in, whereby it was injured, but that fact of itself would afford no ground of liability on the part of the defendant. It is not claimed that the so-called machine was defective in any respect, or was imperfectly constructed. On the contrary, it was a very simple device, and there was nothing complicated, obscure, or concealed in respect to its use or operation. Whatever of risk or danger there was in the work he was ordered to do at the time was open and plain to the most ordinary comprehension, and he was a man of mature years, with the knowledge and experience stated. There was no reason on the part of the defendant to suppose that he needed either admonition or instruction as to the danger or the method of doing his work, and there was no claim in the evidence, or made at the argument, that any particular or special instruction was either necessary or usual. We are clear that there is no evidence

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whatever justifying any imputation of negligence to the defendant in this respect, or for setting him at work on a spindle driven by steam power, the velocity of which it appears was not very materially greater than when turned by hand, and in respect to which he had had an extended practical experience. If any risk or danger there was in the employment, it was plain and open to observation upon the most casual inspection. He cannot, therefore, now be heard to say that he was not aware of, and did not appreciate, the danger. It certainly was not necessary to tell him that, if he allowed his hand to be caught in the hay just where it was being wound around the spindle, there was danger that it would be seriously injured. Common sense would suggest that from the condition of affairs open to his observation. *Crowley v. Pacific Mills*, 148 Mass. 228; *Linch v. Sagamore Mfg. Co.* 143 Mass. 206; *Russell v. Tillotson*, 140 Mass. 201; *Kean v. Detroit C. & B. R. Mills*, 66 Mich. 277. We must hold, therefore, upon the facts of the case and the well-settled rule of law applicable to them, that the injury the plaintiff received was from one of the ordinary risks of the work he was engaged in, and that upon entering upon the work by direction of the foreman and under the circumstances stated, he assumed the risk, and is therefore not entitled, upon the facts shown, to recover in this action. The cases in this court are too numerous and too plain to justify further discussion. *Burnell v. West Side R. Co.* 87 Wis. 387; *Corcoran v. Milwaukee G. L. Co.* 81 Wis. 191; *Showalter v. Fairbanks, Morse & Co., post*, p. 376; *Naylor v. C. & N. W. R. Co.* 53 Wis. 661; *Johnson v. Ashland Water Co.* 77 Wis. 51; *Paule v. Florence M. Co.* 80 Wis. 350; *Goltz v. M., L. S. & W. R. Co.* 76 Wis. 136; *Haley v. Jump River L. Co.* 81 Wis. 421; *Cole v. C. & N. W. R. Co.* 71 Wis. 114.

The fact that Burns, the foreman, told the plaintiff, when he objected to working on the spindles driven by steam,

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"Either go there or get out," does not obviate the objection to the plaintiff's right to recover. If an employee of full age and ordinary intelligence, upon being required by his employer to perform duties more dangerous or complicated than those embraced in his original hiring, undertakes the same, knowing their dangerous character, although unwillingly, from fear of losing his employment, and is injured by reason of his ignorance and inexperience, he cannot maintain an action therefor against his employer. *Leary v. B. & A. R. Co.* 139 Mass. 580; *Bradshaw's Adm'r v. L. & N. R. Co.* (Ky.) 21 S. W. Rep. 346; *Woodley v. Metropolitan R. Co.* L. J. 46 Exch. Div. 521. Whatever danger or peril there was in the work he was ordered to do was, as already observed, plain and obvious. His objection to doing the work was not that it was dangerous, but that he did not understand it, and particularly that he was not strong enough to handle the cores. But, if he saw and understood that the work was of a dangerous character, it was his duty to decline the employment.

For these reasons it is plain that the recovery cannot be sustained.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

MILLS, Respondent, vs. THE NATIONAL FIRE INSURANCE COMPANY, Appellant.

September 12—October 2, 1894.

Change of venue.

The circuit court upon its own motion can change the venue of an action only in the cases mentioned in sec. 2623, R. S.; and the facts must appear from the record.

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APPEAL from the Circuit Court for *Chippewa* County.

It appears from the record that this action was commenced in the circuit court for Eau Claire county, and issue was joined therein August 2, 1890; that February 8, 1892, the parties, by their respective attorneys, stipulated in open court that the presiding judge might call in another judge to try the cause, with a jury to be impaneled therein, unless the action should be continued for cause; that February 23, 1892, that stipulation was filed of record in the cause; that September 21, 1893, the cause being on the calendar and then for trial, the court ordered that the same be transferred to the county of Chippewa for trial, as provided by law, and that order was entered therein and recited that the defendant's attorney had objected to the cause being tried by the presiding judge, because of the entry of the stipulation so on file; that September 22, 1893, the record was filed and entered in the circuit court for Chippewa county; that April 3, 1893, the circuit court for Chippewa county refused to strike the cause from the calendar; that on the same day the term of the circuit court for Chippewa county was, by consent of all of the attorneys, continued, the term including the cause in question; that May 1, 1894, the defendant's attorney moved the court, upon due notice to the plaintiff, and upon the records in the cause, and upon an affidavit duly served, to remove the action for hearing and trial to the circuit court for Eau Claire county, for the reason that the action was never legally or properly removed therefrom, and could not be legally tried in Chippewa county. From an order denying that motion the defendant appeals.

The cause was submitted for the appellant on the brief of *V. W. James*, and for the respondent on that of *J. F. Ellis*.

For the respondent it was contended, *inter alia*, that it must be assumed from the record that the removal from

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Eau Claire county was for one or more of the causes designated in sec. 2622, R. S. The presiding judge must have had reason to believe that an impartial trial could not be had therein while he presided, or that the ends of justice would be promoted by the change,— the removal in either case being at the discretion of the court, provided the facts upon which the removal was founded were satisfactory to him. *Lego v. Shaw*, 38 Wis. 401; *Church v. Milwaukee*, 31 id. 512. The matter warranting the change may be within his own knowledge. *Schattschneider v. Johnson*, 39 Wis. 387; *Jackman Will Case*, 27 id. 409. And where an order is made on the above grounds it must be assumed that the court was satisfied of the existence of the cause for the removal. *Giese v. Schultz*, 60 Wis. 449. It is sufficient if the court is satisfied that a cause for change exists to promote the ends of justice, and no petition or affidavit is required by statute or rule of court. *Cartright v. Belmont*, 58 Wis. 370. See, also, *Challoner v. Boyington*, 86 id. 217; *Postel v. Weinhagen*, id. 302; *Maher v. Davis & Starr L. Co.* id. 530.

CASSODAY, J. The change of venue in pending actions is a matter regulated entirely by statute. The statute provides that "whenever the judge is a party, or interested in the matter in controversy, in any action pending before him, or is related to, or has been of counsel for either party, the court, or the presiding judge thereof, shall, upon application of either party, *and may without such application*, change the place of trial of such action." R. S. sec. 2623. It appears from the record that the order changing the venue from Eau Claire county to Chippewa county was made by the presiding judge on his own motion, and without the knowledge or consent of the defendant's attorney. The record fails to show that the presiding judge was a party, or interested in the controversy, or was related to

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either of the parties, or had been of counsel in the case for either of the parties. This being so, he manifestly had no authority to make the order changing the venue to Chippewa county, as he did.

By the Court.— The order of the circuit court appealed from is reversed, and the cause is remanded with direction to change the venue back to Eau Claire county.

SAFFORD, Respondent, vs. CONAN, Appellant.

September 12 — October 2, 1894.

Tax titles: Deed prematurely issued: Findings: Clerical error: Contradiction: Bill of exceptions.

1. In ejectment a finding that a tax deed executed in 1886, upon which plaintiff's title rests, was founded on a certificate of the sale of the land for the taxes of 1883, does not sustain a judgment for the plaintiff, since it shows that the deed conveys no title because issued within three years from the date of the sale, which could not have taken place earlier than May, 1884.
2. In the absence of a bill of exceptions, this court cannot treat the statement as to the taxes of 1883 as a clerical error, and assume that the taxes of 1882 were meant; nor, if the statement is contradicted by the other findings, can it determine which finding is correct.

APPEAL from the Circuit Court for *Douglas* County.

Ejectment. The facts are stated in the opinion.

Champ Green, for the appellant.

For the respondent there was a brief by *Swift, Murphy & Bundy*, and oral argument by *W. P. Swift.*

WINSLOW, J. This is an action of ejectment tried by the court. There is no bill of exceptions. The plaintiff recovered judgment. His title rests on a tax deed executed September 21, 1886. The court, among other findings,

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found that this tax deed was founded on a tax certificate issued for the sale of the lands in controversy for the taxes of 1883. This amounts to a finding that the sale upon which the deed is based took place not earlier than May, 1884. If this was the fact, the deed conveyed no title, because it was issued within three years from the date of the sale. *Whittlesey v. Hoppenyan*, 72 Wis. 140. It was urged that the fact was that this deed was founded upon the tax of 1882, and that the statement in the findings is a clerical error; but we have not the evidence before us, and so the finding must be treated as a verity. It is said, also, that this finding is contradicted by certain other findings in the case. Even if this be so, we cannot, in the absence of the evidence, determine which finding is correct. We can reject one no more than we can another. No course is open but to reverse the judgment, because the findings show that the plaintiff had no title. Inasmuch as it was seriously claimed that this finding was a mistake, a new trial will be awarded.

By the Court.— Judgment reversed, and action remanded for a new trial.

THE STATE EX REL. HAWLEY, Appellant, vs. COUNTY BOARD OF SUPERVISORS OF POLK COUNTY and another, Respondents.

September 13 — October 2, 1894.

Counties: Removal of county seat: Petitions: Addition and withdrawal of names: Variance between names on petition and on poll list: Evidence of identity: Mandamus *to county board.*

1. Under sec. 655, S. & B. Ann. Stats., two petitions, having the signatures of different qualified signers, for the submission to the electors of the question of the removal of a county seat, should be considered and acted upon by the county board as one petition, al-

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though the second was presented while the first was under consideration.

2. Until proper final action by the county board on such a petition, signers thereof may withdraw their names; and where an alternative writ of *mandamus* has been issued to compel the county board to consider and act upon the petition, the return thereto may show the withdrawal of names, even after service of the writ.

3. Where the signatures to the petition vary from the names on the poll list,—as where initials only are used in one while the full given names appear on the other, or a middle initial used in one does not appear in the other, etc.,—the board should receive evidence, by affidavit or otherwise, to show that the petitioners are the same persons whose names are on the poll lists.

4. *Mandamus* will lie to compel the county board in such a case to receive evidence as to the identity of the petitioners with the electors whose names are on the poll lists, and also to compel the board to consider and act upon a second petition with additional signatures, presented while the first was under consideration.

APPEAL from the Circuit Court for *Polk* County.

This is an appeal from an order overruling a demurrer to the return of the respondents to an alternative writ of *mandamus* issued to compel a meeting of the county board of supervisors of Polk county to consider petitions that had been submitted in respect to the question of removal of the county seat of that county from Osceola to Amery to the qualified voters as required by law, and to receive and count as upon petition in favor of such submission the names appearing on a certain petition referred to in said writ, as well as 147 names on a certain other like petition filed November 21, 1893, and to submit the question of removal of the county seat from said Osceola to Amery in the manner provided by law, or that they show cause, etc. The material question was whether 1,016 names of qualified electors appearing upon the poll lists at the last general election in the county had been signed to said petitions for such purpose.

It was alleged, in substance, in the relation and writ, that a petition signed by 1,410 qualified signers had been pre-

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sented, called "Exhibit A" in said writ, in favor of submission, and that by comparison of this petition with the poll lists of the several election districts it appeared that some of the legal voters signed said petition, using their initials, whereas their given names appeared in full upon the poll lists, and some of the signers had added or omitted an initial in signing said petition to their names as appearing upon the poll lists; that a proposition that the chairman of each town be allowed to view the poll lists and petition for the purpose of identifying the names of the petitioners was voted down. The board struck from said petition 136 names on the ground of such differences between them as appeared on said petition and on said poll lists. An exhibit was annexed to said relation and writ, showing such differences; and it is charged that the supervisors refused to take, or allow to be taken, any steps, testimony, or evidence to identify such names as they so appeared as the voters whose names appeared on the poll lists; that 164 other names were stricken from said petition on the ground that they could not be found on the poll lists of the election districts wherein and for which they were signed, and the names of seventeen others as having signed it before and after signing a revocation of said petition; that 129 others signed a revocation, and their names were stricken from said petition, leaving, as it is alleged, 1,100 names of legal signers thereon which should have been counted in favor of submission; that another petition, in form similar to Exhibit A, containing in fact 148 names of voters of said county, none of whom had signed such other petition, was filed for the same purpose with the board before its refusal to submit the question, but it refused to consider such petition, although it contained a demand on the part of the signers that their names should be counted for removal; that all said 148 names were on the poll lists of the several voting districts at the last general election; that

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after reviewing Exhibit A, and before taking action thereon, a number of voters whose names appeared on said petition came before the board and asked to be permitted to make proof of the identity of their names, as they appeared upon the petition, with themselves and with their names as the same appeared upon the respective poll lists, but the board refused to allow any proof of such fact; that the board struck the names of three voters from said petition, although they made affidavit they had never signed any petition or remonstrance against removing the county seat to Amery; and that the board refused to submit the question of removal to a vote of the electors.

The return of the respondents denies that the petition, Exhibit A, contained 1,410 names of legal voters as appeared from the poll lists. It admitted that there were the names of 2,540 legal voters on such lists; that the motion that each chairman should be allowed to view the petition, with a view to determining the names thereon, was lost, and that they determined not to count or consider as a part of said petition the 136 names signed in the manner specified in the relation and writ; and that the board refused and declined to act upon the petition containing 148 names, but denied all knowledge or information sufficient to form a belief as to whether the names thereon were those of legal voters upon the poll lists, and, except as admitted, denied every allegation in the petition. It was further averred that the petition containing 1,410 names was referred to a committee of eight members; that they fairly and deliberately compared the petition with the poll lists of the several voting precincts of the county for the last general election, and made a report showing the result of such investigation, in substance, that there were eighty-five names where there is a difference in initials, in spelling, or where there is an extra initial; that there were fifty-one names where there was a difference of an initial

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for a name, or of a name for an initial; that there were 1,093 names that compared with the poll lists; that there were 164 names not found on the poll lists of the towns where they appeared to have been signed; that there were seventeen names signed twice,— that is to say, before and after signing a revocation; that the total number of names on revocations was 222, of which 125 were of names counted on the petition, and ninety-three not so counted; that the report was acted upon with care and deliberation, after the members of the board had had an opportunity to *consider and understand said petition, report, and findings, and they thereupon determined* that the petition did not contain the requisite number of names of voters to authorize a submission of the question of removal, and passed the following resolution: "Resolved by the county board of the county of Polk that, whereas the statement of the committee on county seat shows 1,093 names on the petition, and the request and demand that 129 of those be taken off and deducted from the 1,093, leaving 964 on the petition, and that the required number of names necessary to be on said petition is 1,016, that the submission to the people to vote on the question be denied."

The return alleged that in refusing to count and consider as a part of the petition the 136 names set out in Exhibit A, in respect to which they appeared differently on the petition than on the poll lists, the board did not act arbitrarily or in violation of the rights of the petitioners, but solely by the fact that said names so set out *did not appear* upon any poll list in the said county at the last general election, and so could not be legally counted; that the 164 other names stricken off were found not to be upon any of the poll lists of the last general election. It is further alleged that the petition containing 148 names was first presented after the former petition had been taken under advisement and referred to a committee, and the board, believing they had

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no right or authority in law to receive and consider it in connection with the petition first filed, refused to do so; that, in denying the motion made to allow members of the board to examine the petition A, the board did not intend to, and in fact did not, prevent any member from inspecting and examining the petition at any and all times, but such action of the board had reference *solely to the manner and the evidence by which it should determine the legality and the sufficiency of said petition;* that there were sixteen other revocations of names on said petition overlooked, and not counted or included in the report of the committee, so that the whole number of names which were properly thereon was 948, instead of 964, as reported; that at the meeting of the board under the writ in April, and prior to the return, there had been filed with the board a remonstrance or revocation paper containing sixty-four names of persons on said original petition, which were found and determined by the board to be legal voters whose names appeared upon the poll lists and constituted a part of the 964 names before mentioned, and the board struck from said petition the said sixty-four names accordingly, whereby the board found and determined the number of names remaining on said petition of legal voters, etc., to be 884; that, as to the second petition, fifty of the names thereon did not appear upon any of the poll lists of the last general election, nineteen of them appearing thereon were signed to said petition twice, making sixty-nine names not entitled to be counted, and that, of the seventy-nine names remaining prior to the making of the return, thirty-nine of the persons named signed a revocation asking that their names be stricken therefrom, leaving but forty names of legal signers thereon.

The respondents attached to their return a certified copy of the proceedings of the board at the annual meeting in November, and at the meeting held under the writ in April, from which it appears that in respect to the 136 names on

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the first petition, signed as already stated, various affidavits were presented, showing that ninety thereof were names of legal voters of the towns named therein, and that they actually voted in their respective towns at the last general election, and were the identical persons whose names appear on the poll lists thereof and written as appeared opposite each of their names as on the petition. The variations in the names were specifically shown, and were of the general character already stated. A committee to whom the matters aforesaid were referred at this meeting reported in regard to these names, that there should be a deduction therefrom, for various reasons, of twenty-six, leaving 108 thus circumstanced, and a motion to proceed to take evidence of the several chairmen as to said 108 names was lost in committee. Upon the question of the number of names of signers properly on said petitions there was a majority and a minority report, but that of the majority was adopted, the report of the minority being to the effect that said petitions contained the names of 1,117 lawful signers; but it satisfactorily appears that the majority of the committee, as well as of the board in adopting their report, refused to consider evidence of the identity of the persons signing said petition with the persons named on the poll lists, where there had been a different method of writing them in the respects already mentioned.

For the appellant there was a brief by *S. J. Bradford* and *Clapp & Macartney*, and oral argument by *M. E. Clapp*. They argued, among other things, that the board should have taken evidence as to the identity of the names. The law does not require that the names shall appear on the petition just as they appear on the poll list. The fact to be determined from the poll list is whether the petitioners constitute two fifths of the legal voters, counting as legal voters simply the number on the poll list. The secondary fact that the name of any petitioner is on the poll

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list may appear by a comparison, or may rest on a presumption, or it may be established by any competent evidence. *Crews v. Coffman*, 36 Neb. 824; *McKinney v. Board of Comm'rs*, 4 So. Rep. 855. The act of investigating—taking evidence—is ministerial. The act of determining from the evidence, where it involves the exercise of any judgment, is judicial. That the board can be compelled to perform a ministerial duty is elementary. *Ex parte Parker*, 120 U. S. 737; *State ex rel. Hadfield v. Grace*, 83 Wis. 295.

H. P. Burdick, for the respondents, contended, *inter alia*, that the statute does not contemplate the taking of proof as to the sufficiency of the petition, except as provided therein. The proceedings under this statute are special in their character, and the supervisors can exercise no powers other than those conferred thereby. While the power exercised is judicial in its character, it is exercised upon proof expressly prescribed. *Loomis v. Bailey*, 45 Iowa, 400; *Herrick v. Carpenter*, 54 id. 340; *La Londe v. Supervisors of Barron Co.* 80 Wis. 380. Where the board is called upon to determine a question of fact, their duty is judicial, and they cannot be compelled by *mandamus* to alter their determination. 14 Am. & Eng. Ency. of Law, 98, 99, 100, 147; *State ex rel. Comstock v. Joint School Dist.* 65 Wis. 631; *Herrick v. Carpenter*, 54 Iowa, 340; *Baker v. Board of Supervisors*, 40 id. 226; *Bennett v. Hetherington*, 41 id. 142; *Johnson v. Eureka Co.* 12 Nev. 28. The question in this case is not the identity of individuals, but the identity of the names only. The board can have no notice or information outside of the petition and poll list as to the identity of the names thereon, and where the names are not identical they should not be received and counted on the petition. *Comm. v. Hall*, 3 Pick. 262; *Comm. v. Shearman*, 11 Cush. 546; *Terry v. Sisson*, 125 Mass. 560; *Comm. v. McAvoy*, 16 Gray, 235; *Parker v. Parker*, 146 Mass. 320; *Davis v. Steeps*, 87 Wis. 472.

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PINNEY, J. 1. The county board of supervisors, in receiving and acting upon the petition for submission to a vote of the electors of the county of the question of the removal of the county seat, under sec. 655, S. & B. Ann. Stats., exercise powers of an administrative character, but do not act in any proper sense in a judicial capacity, although, as in the case of many other public bodies and officers, it becomes necessary for them to pass upon and determine questions of fact in exercising their legitimate functions. They do not proceed after the manner of judicial tribunals, or use any set form or process in exercising their powers, but proceed very much after the method of legislative bodies. It would, we think, savor too much of unnecessary formality and technical refinement to hold that two petitions having the signatures of different qualified signers for the submission of the question of the removal of the county seat could not be considered and acted upon as one petition. We think, therefore, that the second petition, though presented while the first was under consideration, should have been considered, and both acted upon together. The return concedes that forty of the signatures on the second petition were those of qualified signers.

2. It was held in *La Londe v. Supervisors*, 80 Wis. 380, that, before final action by the board, electors who had signed such a petition might lawfully withdraw their names. It is plain that the withdrawal from the first petition of the names, made at the November session, and from the second petition, made at or before the April meeting of the board held to frame and adopt a return to the alternative writ, were properly made; and we are also quite clear that the withdrawal of the sixty-four names from the first petition at the April meeting was in due season and effective. The alternative writ goes upon the ground that the matter of the petition had not been regularly and finally determined, and the object of the writ is to secure proper final action

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thereon. The signatures of two fifths of the electors who voted at the last general election were essential to the jurisdiction of the board, and the proceeding, until proper final action is had, must be regarded as *in fieri;* and therefore it is competent to show by the return, or by an amended or supplemental return, any valid reason why the alternative writ should not be obeyed, though it was discovered or arose after the writ was served. The return concedes that there were on the first petition the names of 964 qualified signers, and alleges that sixteen withdrawals made at the November meeting had been overlooked. So, deducting these and the sixty-four withdrawals at the April meeting, it would leave 884 names properly on the first petition, to which are to be added the forty names of qualified signers on the second, making 924 names properly on the petitions. It required the signatures of 1,016 qualified signers to justify the submission of the question of removal to a vote of the electors.

3. The committee, at the April meeting, and the board as well in adopting its report, determined that certain deductions should be made from the 136 names on the first petition, the signatures of which in certain respects varied from the names on the poll lists, thus leaving only 108 names, and refused to take evidence as to the identity of these persons with the persons whose names appeared on the poll lists. It was clearly averred that these persons were competent signers, and the general denial of all allegations not admitted does not countervail the effect of this conceded action of the board. The question is thus presented whether the board should have received evidence, by affidavit or otherwise, to explain whatever was ambiguous or uncertain in respect to these signatures when compared with the poll lists, as to show that N. Jensen, Byron De Golier, W. E. Paulson, etc., who thus signed the petition, were the same persons named on the poll lists as Nels

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Jensen, Byron A. De Golier, and W. A. Paulson, and the like. While it may be conceded that the board had no power to compel the attendance of witnesses and to require them to submit to examination and cross-examination under oath as in a court of justice, yet when the nature of the proceeding, the powers of the board, and the practical necessities of the case are considered, we think it clear that the proof and method of proof tendered were competent, and that in refusing to receive it and rejecting these names the board acted arbitrarily and illegally, and that for the purpose of this appeal it is proper to assume that if evidence had been received it would have appeared that these 108 signers were competent and legally qualified, and if those names are added to the 924 above set forth the whole number would be 1032,—a greater number than was necessary to authorize the submission in question.

The proceeding in question is not in its nature final. It decides only that an election shall be held on the question of removal, and errors in signing the petition, and consequent ambiguities and uncertainties, will necessarily arise, as the names on the poll list are taken down by the clerks hastily, and oftentimes in the briefest or very inaccurate manner. These uncertainties and ambiguities must be settled by the board in the same way that they settle any other question of fact coming before them in the discharge of their duties; otherwise, the many errors in names which occur on poll lists in hastily conducting elections will, in a very great degree, render the execution of the law in question impracticable. Strictly legal evidence, such only as a court would receive, cannot, from the nature of the case, be obtained. That evidence to resolve such ambiguities or uncertainties would be competent in a similar case in a court of justice cannot be, and is not, denied. The admissibility of the evidence tendered for the purpose stated cannot, we think, be doubted. *Ayres v. Moan*, 34 Neb. 210; *Crews v.*

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Coffman, 36 Neb. 824. Good faith on the part of the board required it to act fairly and impartially in the matter, and to give a reasonable opportunity to parties interested to produce such proof as they might be able, and, when produced, to weigh it in like manner. No doubt the decision of the board, regularly and fairly made, as to the facts proved, would be conclusive; but here the board illegally refused to consider any facts *dehors* the petition and poll lists, and denied the right, essential to a fair hearing, of producing evidence. A decision thus arrived at cannot be held conclusive without violating every principle upon which a fair and impartial determination depends. The case of *La Londe v. Supervisors*, 80 Wis. 380, affords no support to such a method of procedure, and does not decide that extrinsic evidence may not be received to remove such ambiguities or uncertainties. Such evidence is clearly necessary to enable the board to determine whether "the names of the voters on the poll lists have been signed to the petition."

The return shows upon its face that the respondents have not fairly pursued their authority, and have not executed the discretion confided to them in a lawful manner. It is the proper function and use of the writ of *mandamus* to keep subordinate and inferior bodies and tribunals within their jurisdiction, and to compel them to exercise the discretionary powers vested in them according to law. The principle which governs such cases is that the writ lies to compel the performance of specific duties imposed by law upon public officers or bodies, in the absence of other adequate remedy. It will not lie in any matter requiring the exercise of official judgment or resting in the sound discretion of the officer or body to whom a duty is confided by law, either to control the exercise of that discretion or to determine the decision which shall be finally given, but only to set the party in motion and compel him to fully

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exercise his functions when he has refused or neglected to exercise them at all. 2 Spell. Extr. Relief, §§ 1432, 1433. And it lies to correct arbitrary and illegal action. Merrill, Mand. §§ 39, 40; *Rex v. Justices of West Riding*, 5 Barn. & Adol. 667. The function of the return is not simply to show what would amount to *prima facie* right in the respondent, in the absence of any allegation to the contrary, but to show a right to refuse obedience in view of the allegations it contains, and if it does not do this it is demurrable. *State ex rel. Cothren v. Lean*, 9 Wis. 279. The return in this case avows and does not justify the refusal of the board to receive and act on evidence as to the 108 names mentioned, or the refusal to act upon the second petition, and to this extent it appears that the relator is entitled to relief. The order of the circuit court overruling the demurrer should be reversed.

By the Court.— The order of the circuit court is reversed, and the cause is remanded with directions to sustain the demurrer.

HENRY, Appellant, vs. MARTIN, Assignee, Respondent.

September 13 — October 2, 1894.

Banks and banking: Voluntary assignment: Preferences: Trust fund.

Before the making of an assignment by an insolvent bank, an agent deposited money of his principal therein in another than his own name, with notice to the bank that it belonged to third parties. The deposit not having been a special one, and it not being claimed that any part of the money which came to the assignee was the identical money deposited, the assets of the bank are not impressed with any trust in favor of the principal so as to make him a preferred creditor.

APPEAL from the Circuit Court for *Chippewa* County.

The plaintiff sent money, to be loaned for him, to one Vesper Morgan. Morgan deposited the money in Sey-

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mour's Bank, in the name of J. D. Morgan, with notice that it was the money of third parties. He claims that at the time when the money was deposited the bank was insolvent, and that Seymour and his clerks knew that it was insolvent. Seymour failed, and assigned to the defendant for the benefit of his creditors. A small sum of money came to the hands of the assignee. The plaintiff claims to recover from the assignee his entire deposit on the ground that it was a trust fund, which remains in the hands of the assignee. There was a general demurrer to the complaint, which was sustained. The appeal is from that judgment.

Vesper Morgan, for the appellant.

For the respondent there was a brief by *T. F. Frawley* and *T. J. Connor*, attorneys, and *C. T. Bundy*, of counsel, and the cause was argued orally by *Mr. Frawley*.

NEWMAN, J. This case is ruled by *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237. The plaintiff made no special deposit of his money in Seymour's Bank. It was not expected that the identical money deposited would be kept and returned, nor is it claimed that it has been kept; nor that any part of the money found in the assignee's hands is the identical money deposited. The deposit created the relation of debtor and creditor. The bank became the plaintiff's debtor, not his bailee. The plaintiff's relation to the assets of the bank in the hands of the assignee is in no wise different from the relation of the common creditors of the bank to the same assets.

By the Court.— The judgment of the circuit court is affirmed.

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HOFFLUND, Appellant, vs. THE JOURNAL COMPANY, Respondent.

September 13 — October 2, 1894.

Libel.

A newspaper publication: "Spoiled a Sensation. An Alleged Shortage at W. Settled by Bondsmen. A rather sensational feature was promised for the meeting of the county board this afternoon. It is alleged that there was a deficit of $2,500 in the accounts of Ex-County Treasurer H. The supervisors claimed that the books were short $2,500. It is claimed, however, for H. that this is for fees collected which belonged to the office and not to the county. The matter was settled by the bondsmen before the meeting of the board," — is not libelous *per se*, and its meaning cannot be enlarged by innuendo.

APPEAL from the Circuit Court for *Douglas* County.

The facts are stated in the opinion.

For the appellant there was a brief by *Crownhart, Owen & Foley*, and oral argument by *C. H. Crownhart*. They contended, *inter alia*, that the statements, "An alleged shortage at West Superior settled by bondsmen" and "The matter was settled by the bondsmen before the meeting of the board," charge embezzlement. *Cochran v. Melendy*, 59 Wis. 209; *Mallory v. Pioneer-Press Co.* 34 Minn. 521; *More v. Bennett*, 48 N. Y. 475; *Bradley v. Cramer*, 59 Wis. 309. If it is not plain that these statements charge embezzlement, then, the complaint having so alleged with the proper innuendo, their meaning should have been left to the jury. Townshend, Slander & Libel, §§ 284–6; Newell, Defamation, S. & L. 274; *Mallory v. Pioneer-Press Co.* 34 Minn. 521; *Edwards v. Chandler*, 14 Mich. 476–7.

For the respondent there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *F. C. Winkler*.

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ORTON, C. J. This is an action for libel. The publication is as follows:

"SPOILED A SENSATION.

"AN ALLEGED SHORTAGE AT WEST SUPERIOR SETTLED BY BONDSMEN.

"WEST SUPERIOR, WIS., Feb. 6. A rather sensational feature was promised for the meeting of the county board this afternoon. It is alleged that there was a deficit of $2,500 in the accounts of Ex-County Treasurer *Dan Hofflund.* The supervisors claimed that the books were short $2,500. It is claimed, however, for *Mr. Hofflund* that this was for fees collected which belonged to the office and not to the county. The matter was settled by the bondsmen before the meeting of the board."

The answer is in justification.

1. The defendant objected to any evidence under the complaint on the ground that it stated no cause of action. The objection was overruled. There is no special damage alleged. There is an allegation that the words mean that the plaintiff was "guilty of having embezzled and converted to his own use $2,500, money belonging to the said county of Douglas." The meaning of the words cannot be enlarged by *innuendo.* The publication is not actionable *per se.* It does not impute the crime of embezzlement. It is only, in effect, that there was a *deficit* in the plaintiff's accounts of $2,500, which he claimed was for fees collected which did not belong to the county but to the office; and this is not disputed in the publication. The matter was settled before it came before the board. There was no demand for the money or for an accounting, or refusal to pay on demand, charged. The language is far short of embezzlement or of any other crime. The objection should have been sustained.

2. The court directed a verdict for the defendant on the

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evidence, and did right in doing so. Whatever the charge was, it was more than proved true. The plaintiff failed to pay over to his successor, as clerk of the circuit court, $2,500, money in his hands, which his successor was entitled to receive from him on the 2d day of January, 1893, for about a month afterwards. His successor often requested him to pay over the money, and he said he did not have it; that his bondsmen had it. The bondsmen finally paid the plaintiff the $2,500, and the plaintiff paid it over to his successor on February 4, 1893. The plaintiff, as a witness called by the defendant, refused to answer many of the most material questions, on the ground that his answers might criminate him, but produced the receipt of Mr. Thompson, his successor, dated the 4th day of February, 1893, for the sum of $2,500 in trust funds. It is not pleasant to speak of the testimony in this case. It certainly more than justifies the publication.

By the Court.— The judgment of the circuit court is affirmed.

HUTCHINS, Appellant, vs. DA COSTA, Respondent.

September 13 — October 2, 1894.

Vendor and purchaser of land: Cancellation of contract: Surrender of interest by act of parties: Bank check: Consideration.

The parties to a contract for the purchase of land mutually agreed that the deal should be considered off, and the contract was accordingly surrendered to the purchaser, and the vendor agreed also to surrender to him a check given for a part of the purchase price and which had been sent away for collection, and that in the mean time payment thereof be stopped. Payment of the check was stopped accordingly, and it was subsequently returned to the vendor by the bank to which he had delivered it for collection and which had credited him with the amount thereof, upon his giving his own check to make good the account. Afterwards the vendor

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delivered the check to an agent who had negotiated the contract for the sale of the land, but who paid no consideration for such delivery. *Held*, that there had been a valid surrender of the purchaser's interest in the land, and a cancellation of his check, and that the delivery of the latter to the agent did not make it an existing obligation.

APPEAL from the Circuit Court for *Douglas* County.

This action was commenced October 14, 1893, to recover the amount of a check of which the following is a copy, to wit:

"New York, October 28th, 1891.

"*National Bank of Commerce in New York*,

"Pay to Frank Ostrander, or order, twenty-five hundred dollars.

"$2,500. A. M. DA COSTA."

The defense alleged and relied upon is to the effect that October 27, 1891, the said *Da Costa* and the said Ostrander entered into a written contract, dated October 27, 1891, reciting, in effect, that Ostrander had received of *Da Costa* $2,500 (being the check in question), being earnest and partial payment for the real estate therein described, for which *Da Costa* therein agreed to pay, within sixteen days after hearing from mortgagee relative to release, $16,500; i. e. $2,500 upon delivery of this receipt, and $14,000 upon delivery of a good and sufficient warranty deed of conveyance, vesting good, clear, and unincumbered title in *Da Costa* or his order; that if *Da Costa* failed in any of the things to be done by him in completing this purchase, time being of the essence of this contract, said earnest payment to be forfeited to Ostrander and *Hutchins*, as a consideration paid for this agreement; but if Ostrander fail to transfer the above-described property, the purchaser having performed his part within the time above specified, then said earnest payment shall, upon presentation of this receipt, be returned to *Da Costa*, and this deal

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shall be void. That said note and said agreement were deposited with the First National Bank of West Superior, with written instructions to the effect that said receipt be delivered to *Da Costa* and said check to Ostrander as soon as Ostrander informed the bank he had secured satisfaction of the mortgage on the property described in the receipt, and in case Ostrander failed to secure said satisfaction the $2,500 was to be refunded to *Da Costa* and the receipt returned to Ostrander,—such memoranda to be governed by the terms of the written contract; and indorsed thereon, signed by Ostrander, were these words: "Received the $2,500, and mortgagee will furnish satisfaction." That November 3, 1891, the said First National Bank delivered the check to Ostrander, who thereupon wrote his name upon the back, and the same was then deposited by Ostrander in the First National Bank to his credit. That the First National Bank thereupon sent the check to New York for collection, with this indorsement, under Ostrander's name, on the back: "Pay William J. Quinlan, Jr., cashier, or order, for collection, and credit account of the First National Bank, West Superior. W. H. SLACK, Cashier." That November 6, 1891, the said *Da Costa* and Ostrander met and mutually agreed that the deal should be declared off and canceled, and the papers returned to *Da Costa*. That the defendant, on the same day, telegraphed the New York bank, stopping payment of the check. That thereupon the words "Payment stopped" were written across the face of the check in red ink. That thereupon Ostrander informed the plaintiff that the deal was off. That November 12, 1891, the check, having been returned to the First National Bank of West Superior, was delivered by that bank to Ostrander, who gave his own check in lieu thereof. That about a month afterwards Ostrander delivered the check in suit to the plaintiff, without his paying any consideration therefor, and turned over to the plaintiff all the papers he had in the matter.

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At the close of the trial, the court directed the jury to return a verdict in favor of the defendant, and they did so accordingly. From the judgment entered upon that verdict, in favor of the defendant, the plaintiff appeals.

F. H. Remington, for the appellant, to the point that there had been no legal rescission of the contract, cited *Richardson v. Johnsen*, 41 Wis. 100; *Telford v. Frost*, 76 id. 172–174; *O'Donnell v. Brand*, 85 id. 97–101.

For the respondent the cause was submitted on the brief of *Knowles, Dickinson, Buchanan, Graham & Wilson.*

CASSODAY, J. The foregoing statement contains the leading facts in the case. The land mentioned was the property of Ostrander. The plaintiff had no right, title, or interest in the land. He was the agent of Ostrander, and as such negotiated the contract of sale with the defendant. The plaintiff's contract or arrangement with Ostrander was such that he was to receive a commission on such sale; but he was in no sense the agent of the defendant, and had no contractual relation with him of any kind. He testified to the effect that he was not acting for the defendant in the transaction; that he never acted as his agent; that he was merely selling him the property; and that the defendant was not to pay him a commission. He does not seek to recover such commission, or for such commission, or for any commission or services in this action. The action is against the defendant as the maker of the $2,500 check, and is based upon that check and nothing else. The complaint alleges, in effect, that the defendant delivered the check to Ostrander, who thereupon became the owner and holder of it; that before the commencement of this action the check was indorsed by Ostrander and by him, for value, transferred and delivered to the plaintiff; and he demands judgment for the full amount of it.

The evidence is undisputed that November 3, 1891, Ostrander indorsed the check, merely to enable the First

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National Bank of West Superior to collect the same from the New York bank upon which it was drawn; that the cashier of the First National Bank thereupon indorsed it for collection; that November 6, 1891, and before it was paid by the New York bank, the defendant and Ostrander mutually agreed that the deal should be considered off and that the contract signed by Ostrander and the defendant, and held by the First National Bank of West Superior, be surrendered to the defendant; that the same was on that day, and in the presence and at the request of Ostrander, surrendered to the defendant; that on the same day the defendant notified the New York bank not to pay the check, and it thereupon refused such payment, and the same was returned, indorsed as mentioned; that November 12, 1891, that check was delivered to Ostrander, upon his giving his own check for the same amount, to make good his account with the bank.

The question recurs whether Ostrander, after so receiving the check, had any legal claim against the defendant for the amount of it. As indicated, he had surrendered his contract with the defendant respecting the land six days before, and had agreed to surrender the check when it should be returned from New York. The statute expressly authorizes an "estate or interest in lands" to be "surrendered or declared," "by act or operation of law," as well as by deed or conveyance in writing. R. S. sec. 2302. The surrender to the defendant of the contract and written instructions, and the consent of Ostrander to the payment of the check being stopped by the defendant, and the taking up of the check from the bank by Ostrander, as mentioned, were acts which operated in law as a surrender and cancellation of all the interest which the defendant had acquired in the land, and also a surrender and cancellation of the check. This principle has been repeatedly considered and sanctioned by this court. *Telford v. Frost*, 76

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Wis. 174, and cases there cited; *Kneeland v. Schmidt*, 78 Wis. 348; *O'Donnell v. Brand*, 85 Wis. 101. In fact, the contract itself provides for its cancellation in a certain event by a simple return of the papers. By such surrender and cancellation the check became a mere nullity in the hands of Ostrander. The mere fact that, some thirty days afterwards, Ostrander delivered the check to the plaintiff, did not put life into it as an existing obligation, especially as it appears from the undisputed evidence that the plaintiff paid no consideration for such delivery.

By the Court.— The judgment of the circuit court is affirmed.

SHOWALTER, Appellant, vs. FAIRBANKS, MORSE & COMPANY, Respondent.

September 13 — October 2, 1894.

Master and servant: Injury from caving in of trench: Assumption of risk: Assurances of superintendent: Promise to remove danger.

1. Plaintiff was injured by the caving in of the sides of a trench about nine feet deep in which he was calking water pipe for defendant. He was a man of mature years and ordinary intelligence, and had had considerable experience in that sort of work, and knew that trenches of that depth were liable to cave in. The same trench had partially caved in a few feet away about ten minutes before, and plaintiff with others had left the work, but he had returned upon being told to go back by defendant's superintendent, who said the ditch was perfectly safe and promised to buy some lumber and have it braced up. *Held* that, notwithstanding such direction and such assurance of safety by the superintendent, the plaintiff, having full knowledge of the danger, assumed the risk when he chose to continue his work.
2. It appearing that plaintiff in going back to work relied upon the assurance that the ditch was safe and not upon the promise to have it braced up, such promise did not entitle him to continue work without being charged with assumption of the risk. [Whether re-

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liance upon a promise to remove the danger could operate in such a case to relieve a workman from assumption of risk, is doubtful.]

8. The promise to buy lumber and have the trench braced up could not be construed to refer to that part in which plaintiff was working when injured, since in the natural course of the work he would have been through there before the materials to brace the trench could be got.

APPEAL from the Circuit Court for *Barron* County.

This action is brought to recover for personal injuries. The evidence showed that the defendant, in August, 1892, was engaged in putting in a system of waterworks in the city of Rice Lake, and in the course of this work was excavating deep trenches and laying waterpipes through the streets. The plaintiff was employed by defendant, July 29, 1892, to calk the pipe in the trenches. One Elder was the superintendent of the work. Plaintiff began his work of calking pipe on the 30th of July, and continued at the work until August 4th. On the last-named day, while plaintiff, with one Simmons, was at work calking pipe in a trench about nine feet in depth, the sides of the trench caved in, and plaintiff was seriously injured. At the conclusion of plaintiff's evidence a nonsuit was granted, and from judgment thereon plaintiff appeals.

For the appellant there was a brief by *H. G. Ellsworth*, attorney, and *T. F. Frawley*, of counsel, and oral argument by *Mr. Frawley*. They contended, *inter alia*, that the risk was not contemplated in the contract of employment. Buswell, Pers. Inj. §§ 207, 208; *Baxter v. Roberts*, 44 Cal. 187; *Ill. Cent. R. Co. v. Welch*, 52 Ill. 183; *Chicago & I. R. Co. v. Russell*, 91 id. 298; *Roux v. B. & D. L. Co.* 85 Mich. 519; *Swoboda v. Ward*, 40 id. 420; *King v. Ford R. L. Co.* 93 id. 172; *Booth v. B. & A. R. Co.* 73 N. Y. 38; *Pantzar v. Tilly F. I. M. Co.* 99 id. 368; *Rumwell v. Dilworth*, 111 Pa. St. 343; *Union P. R. Co. v. Fort*, 17 Wall. 553; *Hough v. T. & P. R. Co.* 100 U. S. 213; *Strahlendorf*

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v. Rosenthal, 30 Wis. 674; *Hulehan v. G. B., W. & St. P. R. Co.* 68 id. 520; *Kelleher v. M. & N. R. Co.* 80 id. 584. Not being within the contract of employment, to charge plaintiff with having subsequently assumed the risk, it must have appeared that he had actual knowledge of the precise danger of sustaining injury by the caving in of the walls of the trench. 2 Thomp. Neg. 974, 975; *Cook v. St. P., M. & M. R. Co.* 34 Minn. 45; *Clapp v. M. & St. L. R. Co.* 36 id. 6; *King v. Ford R. L. Co.* 93 Mich. 172; *Dorsey v. Phillips & C. Const. Co.* 42 Wis. 583; *Hulehan v. G. B., W. & St. P. R. Co.* 68 id. 520; *Nadau v. White River L. Co.* 76 id. 120. General knowledge of the liability of earth to cave in is not sufficient to charge plaintiff with assumption of the risk. *Cook v. St. P., M. & M. R. Co.* 34 Minn. 45; *Kearns v. C., M. & St. P. R. Co.* 22 Am. & Eng. R. Cas. 287; *Dumas v. Stone*, 65 Vt. 442; *Huddleston v. Lowell M. Shop*, 106 Mass. 282; *Doyle v. Baird*, 6 N. Y. Supp. 517. Having returned to work at the request and upon the assurance of the defendant that there was no danger in continuing to work in the trench, the plaintiff did not assume the risk of being injured. 2 Thomp. Neg. 1010; *Hutchinson v. Y., N. & B. R. Co.* 5 Exch. 343; *Russell v. M. & St. L. R. Co.* 32 Minn. 230; *Cook v. St. P., M. & M. R. Co.* 34 id. 45; *Keegan v. Kavanaugh*, 62 Mo. 230; *Flynn v. K. C., St. J. & C. B. R. Co.* 78 id. 195; *Patterson v. P. & C. R. Co.* 76 Pa. St. 393. Having returned to work at the request of and relying upon the promise of the defendant to protect the trench, the danger not being imminent and the accident occurring within a reasonable time, plaintiff is not chargeable with assumption of the risk. Cooley, Torts, 661; Dearing, Neg. § 201; Thomp. Neg. 1009; Wharton, Neg. §§ 220, 221; *Greene v. M. & St. L. R. Co.* 31 Minn. 248; *Roux v. B. & D. L. Co.* 85 Mich. 519; *Thorpe v. Mo. Pac. R. Co.* 89 Mo. 650; *Hough v. T. & P. R. Co.* 100 U. S. 213; *Stephenson v. Duncan*, 73 Wis. 404.

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V. W. James, for the respondent, argued, among other things, that the plaintiff assumed the risk, which was as apparent to him as to the defendant. Plaintiff's testimony shows him to have acquired about as much knowledge of the liability of a bank of earth to cave as could be acquired, and he may well be regarded as an expert in respect to such work. *Naylor v. C. & N. W. R. Co.* 53 Wis. 661; *Johnson v. Ashland W. Co.* 77 id. 51; *Paule v. Florence M. Co.* 80 id. 350; *Mulcairns v. Janesville*, 67 id. 24; *Vincennes W. S. Co. v. White*, 124 Ind. 376; *Griffin v. Ohio & M. R. Co.* id. 326; *Swanson v. Lafayette*, 134 id. 625; *Carlson v. Sioux F. W. Co.* 59 N. W. Rep. 217; *Songstad v. B., C. R. & N. R. Co.* 5 Dak. 517; *Fairmount C. Asso. v. Davis*, 36 Pac. Rep. 911; *Olson v. McMullen*, 34 Minn. 94; *Pederson v. Rushford*, 41 id. 289; *Larich v. Moies*, 28 Atl. Rep. 661; *G., H. & S. A. R. Co. v. Lempe*, 59 Tex. 19; *Anderson v. Winston*, 31 Fed. Rep. 528; *Rasmussen v. C., R. I. & P. R. Co.* 65 Iowa, 236; *Simmons v. C. & T. R. Co.* 110 Ill. 340; *Leonard v. Collins*, 70 N. Y. 90; *Dist. of Columbia v. McElligott*, 117 U. S. 621; *Brown v. Oregon L. Co.* 24 Oreg. 315; *Walsh v. St. P. & D. R. Co.* 27 Minn. 367; *Hughes v. W. & St. P. R. Co.* id. 137. Defendant's promise to get lumber and brace up the walls of the trench after plaintiff should have laid pipe up to the shovelers, does not relieve plaintiff from the assumption of risks involved in working in the trench as it then was. *Corcoran v. Milwaukee G. L. Co.* 81 Wis. 191; *Marsh v. Chickering*, 101 N. Y. 396; *Meador v. L. S. & M. S. R. Co.* 37 N. E. Rep. 721; *Gowan v. Harley*, 56 Fed. Rep. 973–982; *Larich v. Moies*, 28 Atl. Rep. 661. Assurances of safety by the master and directions to perform the work do not relieve the servant from the assumption of the risks of a situation that is open and obvious. *Hoth v. Peters*, 55 Wis. 405; *Toomey v. Eureka I. & S. Works*, 89 Mich. 249; *Reese v. Clark*, 146 Pa. St. 465; *Bradshaw v. L. & N. R. Co.* 21 S.

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W. Rep. 346; *Wheeler v. Berry*, 95 Mich. 250; *Linch v. Sagamore Mfg. Co.* 143 Mass. 206; *Russell v. Tillotson*, 140 id. 201; *Leary v. B. & A. R. Co.* 139 id. 580; *Kean v. Detroit C. & B. R. Mills*, 66 Mich. 277; *Roul v. E. T., V. & G. R. Co.* 85 Ga. 197; *Wormell v. Me. Cent. R. Co.* 79 Me. 397; *Southern Kan. R. Co. v. Moore*, 49 Kan. 616; *Johnson v. Ashland Water Co.* 77 Wis. 51.

WINSLOW, J. The nonsuit was granted on the ground that the plaintiff had assumed the risk. In order to fully understand this question a further statement of the facts in evidence is necessary.

The proof showed that the plaintiff was a man thirty-seven years of age and of ordinary intelligence; that he had been employed laying and calking pipe for waterworks contractors, "off and on," for several years and in several cities; that when not engaged in this business he worked as a common laborer; that he had noticed trenches cave in a number of times in other places, and three times at Rice Lake, the last time being about ten minutes before he was hurt; that he knew trenches not braced were liable to cave in, from experience; that the soil where the trench caved in was a clay soil about eighteen inches in thickness, with sand and gravel beneath; and that the digging crew was about two or three rods ahead of plaintiff and Simmons, and a few minutes before the accident some sand fell from the side of the trench where the diggers were at work. When this happened the digging crew left the trench, and plaintiff and Simmons also got out because they were afraid it would cave in. The superintendent, Elder, and a foreman were on the ground when the plaintiff got out of the ditch. The foreman said he would not be afraid to lie down in the ditch all night, and would do so for a dollar and a half. Mr. Elder said: "Boys, go back to the ditch, and lay up to where the shovelers are, about three or four

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lengths. The ditch is perfectly safe. Go back and go to work. I will go right down to the office, buy lumber, and have it braced and curbed up." Upon this plaintiff and Simmons went back to work because, as plaintiff says: "I took Mr. Elder's word. I thought he had more experience than I had, and I felt the bank was perfectly safe. I took Mr. Elder's word." After they had been at work about ten minutes the trench caved in, inflicting the injuries of which plaintiff complains.

Upon these facts we are clearly of opinion that the plaintiff must be held to have assumed the risk. He was of ordinary intelligence. He knew that trenches of this depth were liable to cave in. He knew that this very trench had just partially caved in at a distance of a few feet. He came out of the ditch because of that very fact. He knew all the facts which the superintendent knew, and had fully as much experience as the superintendent. No expert engineer could have given him any additional information as to the probability of the ditch caving in. In fact, he was fully informed of the peril, and chose to continue his work. No principle is better established than that under such circumstances the risk is assumed. *Naylor v. C. & N. W. R. Co.* 53 Wis. 661; *Johnson v. Ashland Water Co.* 77 Wis. 51; *Paule v. Florence Mining Co.* 80 Wis. 350. But it is said that the assurance of safety given by the superintendent, and the command to return to work, relieve the plaintiff of the consequences of his assumption of the risk. This is not the case where the employee is of full age and capacity and knows the danger as fully as the superintendent. *Toomey v. Eureka I. & S. Works*, 89 Mich. 249; *Linch v. Sagamore Mfg. Co.* 143 Mass. 206; *Kean v. Detroit C. & B. R. Mills*, 66 Mich. 277; *Bradshaw's Adm'r v. L. & N. R. Co.* (Ky.) 21 S. W. Rep. 346. Plaintiff had the right to refuse to obey the order, and if he chose to obey he took the risk of which he had full knowledge.

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It is further said that there was a promise to remove the danger, and that plaintiff was entitled to work for a reasonable length of time in reliance on that promise without being charged with assumption of risk. It is quite doubtful whether this principle applies to such a case. Its usual application is to machinery or tools which are found to be dangerously defective. *Gowen v. Harley*, 56 Fed. Rep. 973. But, conceding its application to such a case as the present, the evidence of the plaintiff is that he relied on the superintendent's assurance that the ditch was safe, in going back to work. He nowhere claims that he relied on the promise to brace up the ditch. There must be reliance on the promise to repair, in order to make such a promise of any avail as an excuse to the employee.

Furthermore, the natural meaning of the promise seems very clearly to be not a promise to brace the ditch where the plaintiff was then working, but that, if plaintiff would lay the pipe up to where the shovelers were, the ditch should thereafter be braced. The superintendent said he would buy lumber and brace the trench. Plainly, this would take considerable time, while the plaintiff's work was transitory simply; and we do not see how such a promise could be reasonably construed to refer to that part of the trench where plaintiff was then at work, and which he would, in the natural course of his work, leave before lumber could be bought and prepared for bracing.

Errors are alleged in the rejection of evidence. As these alleged errors do not affect the question of the plaintiff's assumption of the risk, we shall not discuss them.

By the Court.— Judgment affirmed.

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JOHNSON, Appellant, vs. THE CITY OF MILWAUKEE, Respondent.

September 13 — October 2, 1894.

Municipal corporations: Constitutional law: General or special law? Classification of cities.

1. Cities in this state being divided into two classes — those incorporated under special laws and those chartered under the general law,— a statute conferring a new power upon all the cities in the former class is a general law and uniform in its operation throughout the state, within the meaning of sec. 32, art. IV, Const.
2. A construction of a statute, not inconsistent with its words, which will support its constitutionality will be preferred to a more natural or obvious construction which would render it invalid. Thus, a statute granting certain powers to "any city operating under a special charter . . . and authorized by such charter to construct sewers," may be construed to apply to all cities whose special charters, *either expressly or by implication*, authorize them to construct sewers.
3. All cities of this state acting under special charters, being authorized thereby to repair and keep in order their streets, are "authorized by such charters to construct sewers," within the meaning of ch. 224, Laws of 1893, since the authority first mentioned carries with it the latter.
4. A statute conferring certain powers upon all specially chartered cities which have or shall attain a certain population, is a general law, within the meaning of sec. 32, art. IV, Const., where the object to be advanced by it bears such a relation to population as to justify a classification upon that basis. Ch. 311, Laws of 1893, giving authority to all specially chartered cities having a population of 3,000 or more to issue bonds for the construction of sewers, for the purchase of lands for public parks, and for permanent street improvements, is *held* a general law and valid.

APPEAL from the Circuit Court for *Milwaukee* County.

This action was brought in the circuit court for Milwaukee county to enjoin that city from issuing certain bonds, and the levy of taxes for their payment, upon the theory that the statutes which authorize the issuing of such bonds

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(ch. 224, 311, Laws of 1893) are unconstitutional, because they are within the prohibition of subd. 9, sec. 31, art. IV, of the constitution, which forbids special legislation to amend the charters of cities. The complaint alleges that the defendant, the city of *Milwaukee*, is about to issue its bonds for the sum of $50,000 for the purpose of perfecting its sewer system, under said ch. 224, Laws of 1893, and for the further sums of $57,000 for permanently improving the streets in that city, and $100,000 for the purchase of lands for public parks and for the improvement thereof, under said ch. 311, Laws of 1893. There was a general demurrer to the complaint, which was sustained. From the order which sustains the demurrer the plaintiff appeals.

For the appellant there was a brief by *Elliott, Hickox & Groth*, and oral argument by *E. S. Elliott*. They contended, *inter alia*, that legislation applying to a certain class or classes is special and not general unless the classification is based upon substantial distinctions which distinguish the members of one class from the members of another. General legislation, when restricted to a class, must be based upon necessity, or on some difference in the situation or circumstances of the subjects composing the different classes by which the necessity of different legislation with respect to them is suggested and justified. *State ex rel. Board of Comm'rs v. Cooley*, 58 N. W. Rep. 153; *Anderson v. Trenton*, 42 N. J. Law, 486; *State ex rel. Sanderson v. Mann*, 76 Wis. 479; *Cobb v. Bord*, 40 Minn. 479; *State ex rel. Richards v. Hammer*, 42 N. J. Law, 440; *Appeal of Ayars*, 2 L. R. A. 582; *Braceville Coal Co. v. People*, 147 Ill. 66. General legislation, when restricted to a class, must be justified by the peculiarities of the class to which such legislation applies. The legislature cannot make a merely arbitrary or artificial classification; there must be an apparent reason justifying such classification, and an evident connection between the distinctive features of the class

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regulated and the regulations adopted. *State ex rel. Board of Comm'rs v. Cooley*, 58 N. W. Rep. 153; *Philadelphia v. Haddington M. E. Church*, 115 Pa. St. 291; *State v. Trenton*, 48 N. J. Law, 438; *Devine v. Cook Co.* 84 Ill. 590; *Woodard v. Brien*, 14 Lea, 520; *State ex rel. Randolph v. Wood*, 49 N. J. Law, 88. To whatever class a law applies it must, to become a general law, be applied to every member of that class. *Clark v. Janesville*, 10 Wis. 135-177; *Johnson v. St. P. & D. R. Co.* 43 Minn. 222; *Weinman v. W. & E. L. P. R. Co.* 118 Pa. St. 192; *State ex rel. Randolph v. Wood*, 49 N. J. Law, 88. Where the designated class is so constituted as to exclude any addition to its number, legislation restricted to such class is special. *State ex rel. Sanderson v. Mann*, 76 Wis. 479; *State v. Pugh*, 43 Ohio St. 98; *State ex rel. v. Smith*, 48 id. 211; *Devine v. Cook Co.* 84 Ill. 590; *Woodard v. Brien*, 14 Lea, 520.

For the respondent there was a brief by *Charles H. Hamilton*, city attorney, and *Charles E. Estabrook*, of counsel, and a separate brief by *Mr. Hamilton*, and *Winkler, Flanders, Smith, Bottum & Vilas*, of counsel; and the cause was argued orally by *Mr. Hamilton* and *Mr. F. C. Winkler*. As to the validity of the classification of cities involved in the acts in question, they cited *Cobb v. Bord*, 40 Minn. 479; *Nichols v. Walter*, 37 id. 264; *Alexander v. Duluth*, 58 N. W. Rep. 866; *State ex rel. Board of Comm'rs v. Cooley*, id. 150; *Walker v. Cincinnati*, 21 Ohio St. 14; *Bronson v. Oberlin*, 41 id. 476, 480; *State ex rel. v. Toledo*, 48 id. 112; *State v. Pugh*, 43 id. 98; *State ex rel. v. Smith*, 48 id. 211; *Costello v. Wyoming*, 49 id. 202; *State v. Brewster*, 39 id. 653, 658; *McGill v. State*, 34 id. 228; *State v. Powers*, 38 id. 54; *Wheeler v. Philadelphia*, 77 Pa. St. 338; *Kilgore v. Magee*, 85 id. 401; *Appeal of Scranton School Dist.* 113 id. 178; *Comm. v. Reynolds*, 137 id. 389; *Comm. v. Denworth*, 145 id. 172; *State ex rel. Richards v. Hammer*, 42 N. J. Law, 436, 440; *State v. Trenton*, 48 id. 438; *S. C.* 49 id. 423; *Paul v.*

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Gloucester Co. 50 id. 585; *State ex rel. Warner v. Hoagland*, 51 id. 66; *Rutherford v. Heddens*, 82 Mo. 388; *Rutherford v. Hamilton*, 97 id. 543; *State ex rel. Martin v. Wofford*, 25 S. W. Rep. 851; *Bell v. Maish*, 36 N. E. Rep. 1118; *People ex rel. D., O. & O. R. Co. v. Granville*, 104 Ill. 285; *People ex rel. Meyer v. Hazelwood*, 116 id. 319, 328, 329; *Haskel v. Burlington*, 30 Iowa, 232; *Burlington v. Leebrick*, 43 id. 252, 257; *McAunich v. M. & M. R. Co.* 20 id. 338; *Iowa R. R. Land Co. v. Soper*, 39 id. 112; *Lake v. State ex rel. Palmer*, 18 Fla. 501; 15 Am. & Eng. Ency. of Law, 984; 22 Am. Law Rev. 403; 35 Cent. Law J. 266; 32 Am. Law Reg. & Rev. 816.

NEWMAN, J. The constitutional provisions which are involved in the decision of this case are:

Art. IV, sec. 31. "The legislature is prohibited from enacting any special or private laws in the following cases: . . . (9) For incorporating any city, town or village, or to amend the charter thereof."

Art. IV, sec. 32. "The legislature shall provide general laws for the transaction of any business that may be prohibited by section 31 of this article, and all such laws shall be uniform in their operation throughout the state."

The statutes challenged, so far as necessary to show the questions raised, are as follows:

Laws of 1893, ch. 224, sec. 1. "The common council of any city operating under a special charter granted by the legislature of this state, and authorized by such charter to construct sewers, is hereby empowered to divide such city into sewer districts and to levy a special tax of not more than one mill and a half of a mill on the dollar of the assessed value of the taxable property in any such sewer district, if in the opinion of the common council such special tax shall be needed for the extension or improvement of the sewer system for such district." Sec. 2. "If in the

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opinion of such common council any such sewer district shall require an extraordinary outlay of money for the construction of outlets or pumping stations to perfect its sewer system, such common council is hereby authorized to provide by ordinance for issuing the corporate bonds of such city."

Laws of 1893, ch. 311, sec. 1. "The common council of any city incorporated by and operating under a special charter granted by the legislature of this state, containing a population of three thousand inhabitants or more, as shown by the last state or national census, is hereby authorized to issue corporate bonds . . . for the following purposes: . . . (2) For the construction of sewers, and for the improvement and maintenance of the same. . . . (9) For the purchase of lands for public parks and improvements thereof. . . . (10) For permanently improving streets in such city and for creating a fund out of which to advance the cost of repair to sidewalks. . . ."

Doubtless, these statutes, if valid, operate as amendments to the charter of every city included within their terms. If they are general laws, within the meaning of the constitutional provisions cited, they are valid and are to be given the effect intended by the legislature. If, on the other hand, they are special laws, within the meaning of those constitutional provisions, they are void and can have no effect. So the exact question presented for decision is whether the statutes cited are special or private laws, within the meaning of the constitution.

These constitutional provisions came into the constitution by amendment after many cities within the state had been incorporated by special laws. The fact that many cities had been incorporated by special laws may be assumed to have been borne in mind by the people when they put those amendments into the constitution. It was not provided or intended that these special charters should be superseded by

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incorporation under a general law. At least, that was not made compulsory. But it is permitted to such cities as were then incorporated under special laws to continue to operate under their special charters. This must have been within the purpose of the people in making the amendments. This naturally makes a constitutional division of the cities of the state into two classes upon that line,—those which are incorporated under special laws, and those which have been organized under the general law. The fact, too, must have been in contemplation of the people, that in process of time, and by reason of the growth and development of the cities which were under special charters, and changed conditions, new and enlarged powers would become necessary to their well-being and progress. It was intended to confer the power to grant such new or enlarged powers upon such cities, by sec. 32 of art. IV. It was intended to confer power ample for the purpose. The only restriction is that such powers shall be conferred only by general laws having a uniform operation through the state. It seems clear that an act of the legislature which should confer a new power upon all the cities in the state which are in that class of cities which are acting under special laws, without any exception, would be a general law and uniform in its operation throughout the state, within the intention of the constitution. If it is found that ch. 224, Laws of 1893, applies to all the cities of the state which are acting under special charters, by this test it is a general law. It does apply to all such cities if all such cities are authorized by their charters to construct sewers.

Perhaps the more natural and obvious meaning of the words of the statute, "authorized by such charters to construct sewers," is "authorized expressly by such charters to construct sewers." If, with that interpretation, some cities which are acting under special charters would be excluded from its benefits, and if such an interpretation

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would make the statute a special law, within the meaning of the constitution, then some other interpretation, not inconsistent with the words of the statute, which will support its constitutionality will be preferred, even if it is not the most natural or obvious construction of the language used. *Bigelow v. West Wis. R. Co.* 27 Wis. 478, 486; *Ruggles v. Fond du Lac*, 53 Wis. 436; 23 Am. & Eng. Ency. of Law, 349, and cases cited in note 2. To hold that the statute intends to include within its benefits all cities acting under special laws which are authorized, either by express provision or by implication, by their charters to construct sewers, is warranted if that construction is necessary to support the constitutionality of the statute.

It would perhaps be unsafe to assume without examination in detail that all special charters of cities expressly authorize the construction of sewers; but perhaps it will be safe to assume, without such examination, that all special charters do give authority to repair and keep in order the streets of the city. This is one of the more common and necessary duties of the city. This authority to repair and keep the streets in order carries with it, without special mention, authority to construct drains and sewers. 2 Dillon, Mun. Corp. (4th ed.), § 805, and the cases cited in note 3. So it seems safe to say that all the cities of the state which are acting under special charters are "authorized by such charters to construct sewers." So it is held that ch. 224, Laws of 1893, applies to all the cities in the state which are acting under special charters, and is a general law, uniform in its application throughout the state, and is valid.

But ch. 311, Laws of 1893, divides into two classes, for the purposes of that chapter, the cities which are operating under special charters, and confers its benefits on one class only. Those having a population of 3,000 or more are authorized to borrow money and issue bonds for certain

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specified purposes: "(9) For the purchase of lands for public parks and improvements thereof. . . . (10) For permanently improving streets in such city." This presents a different question.

It would seem that, if it is competent to legislate at all for cities acting under special charters, it should be competent to make some classification of them suited to their different conditions and necessities. All cannot use with benefit powers which would be of great advantage to some. A law which should provide for one case only, in a proper case, should be held to be a general law. It is not required that all general laws shall be equally general. A law legislating for a class is a general law when it is for a class "requiring legislation peculiar to itself in the matter covered by the law." A law relating to particular persons or things as a class is said to be general; while a law relating to particular persons or things of a class is deemed special and private. Whether such laws are to be deemed general laws or special laws depends very much upon whether the classification is appropriate. Certain rules by which the propriety of the classification may be tested have been stated by courts and have become well established. These rules are applied by the decisions with varying strictness. The main difficulty is in the application of the rules.

One rule is: All classification must be based upon substantial distinctions which make one class really different from another. It is urged in favor of the classification made by ch. 311 that there is much less necessity for perfectly and expensively constructed streets and costly and extensive public parks in small cities than there is in large ones. In small cities the streets are much less used, and so high a degree of perfection is not required; while, as to public parks, the people are all, already, as near to the country and the free air as many of the citizens of large cities can be to any public park. It is considered that there

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is something substantial in this view of the different requirements of large cities as compared with small cities, which makes one class really different from the other as respects the propriety of creating debts for permanently improving streets or for buying land for public parks. The difference is sufficient to account for and to justify such a classification for that purpose. It is usually appropriate to classify by population, especially where the object to be advanced by it bears fairly a relation to the number of population in either class; and, while opinions may fairly differ as to where the line of distinction should be drawn, that is fairly a subject for the exercise of legislative discretion. It is not open to question by the courts, unless it shall appear to be a mere device to evade the constitutional provisions.

Another rule is: The classification adopted must be germane to the purpose of the law. The distinction in the classification made by ch. 311 is based upon a real difference of situation, as between large and small cities, as regards the necessity or propriety of creating debts for permanent improvement of streets, and for the purchase of lands for public parks and their improvement. It is germane to the purpose of the law.

Another rule is: The classification must not be based upon existing circumstances only. It must not be so constituted as to preclude addition to the numbers included within a class. The test provided by ch. 311 by which to determine which cities are within its provisions, is "the last state or national census." On its face, the statute seems intended to be prospective in its operation; so that such cities as in the future shall attain to the required population may have the benefits of its provisions. With this interpretation, it is in compliance with this rule. If its proper interpretation were doubtful, it would receive such interpretation as would render it in compliance with this rule.

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Another rule is: To whatever class a law may apply, it must apply equally to each member thereof. Ch. 311 complies with this rule. It operates equally upon each member of the class. It applies equally to every city of the class having a population of 3,000 or more.

Authorities relating to the questions discussed in this opinion will be found as follows: 15 Am. & Eng. Ency. of Law, 978, and several following pages, and in the notes; 23 Am. & Eng. Ency. of Law, 148–151, and notes; articles in 32 Am. Law Reg. & Rev. pp. 127, 816.

The questions presented have not been considered to be free from doubt and difficulty. In their solution the principle that a statute is not to be condemned as unconstitutional unless it is clearly so has had its appropriate influence. Both of the statutes questioned are considered to be general laws, within the intention of the constitution, and so valid. The demurrer to the complaint was rightly sustained.

By the Court.—The order of the circuit court is affirmed.

NELSON, Respondent, vs. DULUTH, SOUTH SHORE & ATLANTIC RAILWAY COMPANY, Appellant.

October 2 — October 23, 1894.

Railroads: Injury to person at highway crossing: Contributory negligence: Failure to look.

Plaintiff was injured by a passing construction train while attempting to drive across defendant's track. He was a teamster by trade, and knew the surroundings perfectly, and knew that this train was running at all times. While approaching the track he had looked and had seen no train, but had afterwards stopped for a minute or more behind a building thirty feet distant from the track, which cut off his view in the direction from which this train came, and had then driven towards the track without looking in that direction until he had passed the building twelve or fourteen feet and his horses' heads were within four or five feet of the track. *Held*, that he was guilty of contributory negligence.

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APPEAL from the Circuit Court for *Douglas* County.

This is an action to recover damages for personal injuries. The defendant's track runs directly through the village of Iron River from east to west. Main street, in said village, runs north and south, and crosses the track substantially at right angles. The defendant's right of way is sixty-six feet in width, and its track is in the center of the right of way, and is straight for about 2,000 feet east of Main street. On the morning of the 17th of November, 1892, in the day time, the plaintiff was driving a team of horses on Main street and approaching the track from the south. The team was attached to a lumber wagon, and plaintiff stood up about the middle of the wagon. At the southeast corner of Main street and the right of way stood a store building, which cut off the view of the track east of Main street to any person approaching on Main street from the south, until he arrived at a point about thirty feet from the track. The plaintiff had looked up the track to the east before reaching this building, but saw no train. He stopped his team when in front of the store, and readjusted the wagon box, and stayed there about a minute, as he testifies. When he had done this, he drove forward down an incline of about three feet towards the track, his team walking and under control. An engine was pushing a train of loaded flat cars from the east, and when the horses got within four or five feet of the track they became frightened at the approaching cars, jumped forward two or three jumps across the track, and the forward car of the train struck the wagon, throwing plaintiff out and inflicting serious injuries. There was evidence that the train was running very fast; that there was no lookout on the forward car; and that no whistle was blown or bell rung.

The jury returned a special verdict, by which they found (1) that the train was negligently operated; (2) that such negligent operation of the train caused plaintiff's team to

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become unmanageable, by reason of which plaintiff was carried in front of the train and was injured; (3) that such negligence was the proximate cause of plaintiff's injury; (4) that plaintiff was not guilty of contributory negligence; (5) that plaintiff's damages were $10,000. A motion for a new trial was overruled, and from judgment for the plaintiff on the verdict the defendant appealed.

For the appellant there was a brief signed by *Catlin & Butler* and *Carl C. Pope*, attorneys, and *A. B. Eldredge*, of counsel, and oral argument by *Mr. Pope*. They argued, among other things, that a person crossing the main track of a railroad must take notice that trains are liable to be passing at any time, and he must stop, look both ways, and listen before attempting to cross, if he would fulfill the requirements of ordinary care. *Martin v. Bishop*, 59 Wis. 417; *Williams v. C., M. & St. P. R. Co.* 64 id. 1, 4; *Gunn v. W. & M. R. Co.* 70 id. 203; *Seefeld v. C., M. & St. P. R. Co.* id. 216; *Winstanley v. C., M. & St. P. R. Co.* 72 id. 375; *Abbot v. Dwinnell*, 74 id. 514; *Schmolze v. C., M. & St. P. R. Co.* 83 id. 659; *Hansen v. C., M. & St. P. R. Co.* id. 631. He must use his senses to avoid danger. *Ernst v. H. R. R. Co.* 35 N. Y. 9; *Havens v. Erie R. Co.* 41 id. 296; *Harty v. Cent. R. Co.* 42 id. 468; *Gorton v. Erie R. Co.* 45 id. 660; *Morrison v. N. Y. C. & H. R. R. Co.* 63 id. 643; *Shaw v. Jewett*, 86 id. 616; *Mo. Pac. R. Co. v. Moseley*, 6 C. C. A. 641; *Rhoades v. C. & G. T. R. Co.* 58 Mich. 263; *Lake Shore & M. S. R. Co. v. Miller*, 25 id. 274; *Haas v. G. R. & I. R. Co.* 47 id. 401; *Carver v. D. & S. Plank R. Co.* 61 id. 584; *Matta v. C. & W. M. R. Co.* 69 id. 109; *Brady v. T., A. A. & N. M. R. Co.* 81 id. 616; *Grostick v. D., L. & N. R. Co.* 90 id. 594. Knowing all the circumstances as the plaintiff did, it was extreme rashness of him to drive down to the track as he did. *Achtenhagen v. Watertown*, 18 Wis. 331; *Hopkins v. Rush River*, 70 id. 11; *Hausmann v. Madison*, 85 id. 187.

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For the respondent there was a brief by *Swift, Murphy & Bundy*, and oral orgument by *R. E. Bundy*. To the point that plaintiff was not guilty of any contributory negligence, they cited *Winstanley v. C., M. & St. P. R. Co.* 72 Wis. 375; *Seefeld v. C., M. & St. P. R. Co.* 70 id. 216; *Roberts v. C. & N. W. R. Co.* 35 id. 679; *Duffy v. C. & N. W. R. Co.* 32 id. 269; *Siegel v. M. & N. R. Co.* 79 id. 404; *Valin v. M. & N. R. Co.* 82 id. 1; *Bower v. C., M. & St. P. R. Co.* 61 id. 457.

WINSLOW, J. There was ample evidence to justify the finding of the jury that the train was negligently operated at the time of the accident. The vital question in the case is whether the finding that plaintiff was not guilty of contributory negligence is justified by the evidence. The plaintiff was a man twenty-two years of age, a teamster by trade, and had lived at Iron River a year and a half. He knew the surroundings perfectly, and knew that this construction train was running at all times. According to his own testimony, he started from behind the store after having looked to the westward and listened for a train from the east. He does not claim even to have looked to the east after he got out from behind the corner of the store, until his horses' heads were four or five feet from the rail of the track. He was standing up in the wagon, about twelve or thirteen feet back of the horses' heads. Thus, it is clear that when he first looked to the east he had passed the corner of the store somewhere from twelve to fourteen feet. Unless there was some obstruction in the way which would prevent his looking up the track after he passed the corner of the store, he was certainly negligent, as matter of law, in not looking. The case is not as if he had been advancing steadily along the street and his view had only been momentarily cut off by the building. In such case, if he had looked up the track be-

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fore passing in front of the building, and seen no train, it might well be that the question whether he could be excused from looking the instant he passed the building would be one for the jury. In the present case he had stopped a minute or more in front of the building, where his view of the track to the east was entirely cut off. This effectually destroyed the value of any previous look eastward, and imposed on him a greater obligation to use his eyes at the first practicable opportunity. There is some evidence that there were some piles of stumps in the right of way along the north side of the store, which would partially impede the view of a man standing on the ground. This evidence is quite vague and unsatisfactory, and the plaintiff's leading witness on the point testifies that from the center of Main street, opposite the northwest corner of the store, you could see 125 feet down the track. This witness also says that if a man were standing in a wagon he could see a great deal better. However the evidence may be as to the view of a man on the ground, there is no witness, not even the plaintiff himself, who testifies that the view of a man standing in a wagon would be materially obstructed by the stumps or by the small cut which existed east of Main street. To justify a man in driving out from behind a building thirty feet distant from a railroad track towards the track, where he knows trains may be expected at any time, without attempting to use his eyes, there certainly must be some substantial evidence that such attempt would be futile. The evidence seems to us to show clearly a case of contributory negligence on the part of the plaintiff.

By the Court.—Judgment reversed, and action remanded for a new trial.

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BERGERON, Respondent, vs. MILES, Appellant.

October 2 — October 23, 1894.

Deceit: Confidential relations: Joint purchase of land.

Defendant induced plaintiff to join with him in the purchase of certain land, each to pay one half of the purchase price, which defendant falsely represented to be $8,000, when in fact it was but $3,000. Plaintiff gave defendant $4,000 to be used in paying for his share, and defendant paid for the land with $3,000 thereof, and kept the remaining $1,000 himself. *Held*, that even though the land was worth $8,000 the deceit was actionable and plaintiff was entitled to recover the amount paid to defendant in excess of his share of the actual price.

APPEAL from the Circuit Court for *Chippewa* County.

One McDonough had an option to purchase certain lands belonging to one Mrs. Putnam, for the sum of $3,000. The defendant induced the plaintiff to purchase with him an undivided one-half of the lands. Each was to pay one half of the purchase price thereof, and to hold the same as equal joint owners. The defendant represented to the plaintiff that the price of the lands was $8,000, and that the lands were worth that price. The plaintiff gave the defendant $4,000, to be used in paying his share of the purchase money. The defendant paid for the lands with $3,000 of that money, and obtained a deed of the lands to himself and the plaintiff jointly, and kept the remaining $1,000 himself. The defendant himself paid nothing for the lands. On learning the facts with reference to the price paid for the land, the plaintiff brought this action to recover from the defendant the amount of money so delivered to the defendant in excess of his share of the price actually paid for the land.

On the trial the court submitted to the jury two questions: "(1) Did the plaintiff enter into an agreement with the defendant to join with him in the purchase of one half interest in the lands mentioned in the complaint, through

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McDonough, with the understanding that the consideration of such purchase was to be $8,000, one half to be paid by plaintiff and one half by defendant? And (2) if to the first question you say, 'yes,' did the defendant represent and tell plaintiff that the purchase price of $8,000 was Mrs. Putnam's price for the lands, and that the same was to be paid to her?" It was agreed by the parties that these two questions covered all the controverted issues in the case. The jury answered both questions in the affirmative. The court gave judgment on the verdict, for the plaintiff, for $2,500. From that judgment the defendant appeals.

For the appellant the cause was submitted on the brief of *T. J. Connor*, attorney, and *H. H. Hayden*, of counsel.

T. F. Frawley, for the respondent.

NEWMAN, J. On the question whether the relation of the parties was such that the deceit practiced upon the plaintiff by the defendant will support the action the case very much resembles *Grant v. Hardy*, 33 Wis. 668. To make the deceit actionable, it is not necessary that the relation of the parties to each other shall be that of partners or tenants in common. Other relations which require and inspire trust and confidence to be reposed by the party deceived in the other may be sufficient to bring the case within the rule, as stated in *Grant v. Hardy* on page 674. If the defendant was under no obligation to the plaintiff to tell him all he knew about the land, he was at least under obligation not to deceive him by false statements with reference to it or the price at which it was to be bought by them. This he did, and so obtained from him much more than plaintiff's share of the price.

It is not denied that the defendant purposely deceived the plaintiff as to the purchase price of the land. Plaintiff supposed that the price to be paid was $8,000. It was, in truth, only $3,000. As it was represented to plaintiff, his share of the price was $4,000. In truth, his share of the

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price was only $1,500. He gave to the defendant, on his representation, $2,500 more than his share of the price and more than he would have given if the defendant had not deceived him. Yet it is argued that this deceit is not actionable, because, it is said, the plaintiff was not damaged by it. This contention is based upon the assumed fact that the bargain was a good one at the price of $8,000. It must be evident that it would have been a better bargain at the price of $3,000. The plaintiff was entitled to his share of the full profit of the bargain. He was entitled to all the profit there was in the bargain by paying only his share of the price. Whatever he has paid more than his share of the price, by so much is the value of his bargain diminished. This is damage. It is damage of which the deceit is the cause. The plaintiff paid $2,500 more than his share of the price. The judgment of the circuit court is right, and is affirmed.

By the Court.— Judgment affirmed.

BAXTER, Appellant, vs. BERG, Respondent.

October 2 — October 23, 1894.

(1) *Appeal: Bill of exceptions.* (2) *Replevin: Form of judgment for defendant.*

1. On appeal from the judgment in a case tried by a jury, if there is no bill of exceptions containing all the evidence, the only question which can be considered is whether the pleadings support the verdict and judgment.
2. In replevin the answer was a general denial. The property was taken by the writ, but remained in the hands of the officer. The verdict found its value, that it was unjustly taken by plaintiff and that defendant was entitled to a return thereof, and that defendant was damaged in a certain sum by reason of the taking and detention. *Held*, that the judgment should have been in the alternative, under sec. 2888, R. S., for a return of the property, or for its value in case a return could not be had, with damages.

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APPEAL from the Superior Court of *Douglas* County.

Replevin, commenced in justice's court. The complaint alleges that the plaintiff is lawfully entitled to the possession of the property, and that the same has been and is unjustly detained by the defendant. The answer is merely a general denial. The plaintiff recovered judgment, and defendant appealed therefrom to the superior court. The property was taken by the officer at the commencement of the action, but upon the appeal neither party gave any undertaking to obtain delivery or return thereof, and it seems to have remained in the possession of the officer. In the superior court there was a judgment for the defendant, from which the plaintiff appeals. The form of the verdict and judgment appear from the opinion.

The cause was submitted for the appellant on the brief of *H. W. Dietrich*, and for the respondent on that of *Thorson & Crawford.*

For the appellant it was argued, among other things, that as the plaintiff did not acquire possession of the property under the statute, the judgment should have been simply for the return of the property, with costs and damages. S. & B. Ann. Stats. sec. 2888.

For the respondent it was contended, *inter alia*, that as the answer was a general denial and did not claim return of the property, the defendant might waive return and take judgment for the value. The case does not come within the provisions of sec. 2888, S. & B. Ann. Stats., because the property was not delivered to the plaintiff but remained in the hands of the officer, and because the defendant did not claim a return. Judgment must be rendered, therefore, in accordance with the provisions prior to the enactment of that section. *Farmers' L. & T. Co. v. Comm. Bank*, 15 Wis. 441–2; *Pratt v. Donovan*, 10 id. 385; *Klœty v. Delles*, 45 id. 490. Under Terr. Stats. of 1839, p. 275, sec. 32, and R. S. 1849, ch. 119, sec. 33, the judgment was properly entered for the value.

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ORTON, C. J. This is an action in replevin for one large refrigerator. The property was taken by the writ. The verdict of the jury is "that the value of the property in controversy is the sum of $145; that the same was unjustly taken by the plaintiff, and that the defendant is entitled to a return thereof; and that the defendant has been damaged by reason of the taking and detention in the sum of one dollar." The court rendered a personal judgment in favor of the defendant of $145 as the value of the property, and $1 damages, together with costs and disbursements.

There appears to be no bill of exceptions in this case signed by the judge, and there is no stipulation that the document stipulated to stand as the bill of exceptions contains all the evidence in the case. We can therefore consider only the question whether the pleadings support the verdict and judgment. *Edleman v. Kidd*, 65 Wis. 18; *Strong v. Stevens Point*, 62 Wis. 255. The only error apparent on the record seems to be the form of the judgment. The judgment should have been for a return of the property, and for its value and damages in case a return thereof cannot be had. S. & B. Ann. Stats. sec. 2888. The property was taken by the writ, and must be disposed of by the judgment. The judgment should have been in the alternative, as above.

By the Court.— The judgment of the superior court is reversed, and the cause remanded with directions to render the proper judgment for the defendant.

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LITTLE, Respondent, vs. SUPERIOR RAPID TRANSIT RAILWAY COMPANY, Appellant.

October 2 — October 23, 1894.

Street railways: Negligence: Collision with carriage: Contributory negligence: Court and jury: Instructions.

1. Plaintiff was injured, while attempting to cross defendant's street railway tracks, by the collision of an electric car with the phaeton in which she was riding. Upon the evidence (stated in the opinion) it is *held* that the questions of defendant's negligence and of plaintiff's contributory negligence were for the jury.
2. An instruction that "although plaintiff might not have exercised ordinary care in turning upon the track, still if the motorman saw her so in danger and unconscious of peril, and thereupon failed to exercise *ordinary care* to avoid the collision, and such want of ordinary care was the proximate cause of the injury, plaintiff should recover," is criticised.
3. An instruction that if the jury concluded that a witness had testified falsely as to any material fact they might disregard all of his testimony unless it was supported by other evidence, was erroneous, since it authorized the jury to disregard the uncorroborated testimony of a witness if they concluded that he had, even through inadvertence or mistake, sworn falsely as to any material fact.
4. An instruction that "there is, when a witness is testifying, an undefinable something that rings of truth, that in spite of and in the face of everything" the jury "have a right and should give heed to," was erroneous as being an invasion of the province of the jury; and the error was not cured by a further instruction that the verdict must be based upon the evidence given in the case, and upon nothing else.

APPEAL from the Superior Court of *Douglas* County.

This action was brought to recover damages for injuries received by the plaintiff, September 1, 1893, on North Third street in West Superior, caused by a collision of one of the defendant's street cars, propelled by electricity, with a phaeton in which the plaintiff was riding, and which collision is alleged to have been caused by the defendant's negligence. The defendant answered by way of admis-

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sions and denials and allegations of contributory negligence on the part of the plaintiff.

At the close of the trial the jury returned a special verdict to the effect that the defendant's negligence caused the collision alleged, and was the proximate cause of the plaintiff's injury, and that there was no contributory negligence on the part of the plaintiff, and also returned a general verdict in favor of the plaintiff, and therein they assessed her damages at $1,500. From the judgment entered thereon in favor of the plaintiff, the defendant appeals.

For the appellant there was a brief by *Ross, Dwyer & Hanitch*, and oral argument by *W. D. Dwyer*. They argued, among other things, that as against positive evidence of credible witnesses of the ringing of a bell, there must be something more than the testimony of one or more that they did not hear it, to authorize the submission of the question to the jury. *Culhane v. N. Y. C. & H. R. R. Co.* 60 N. Y. 133; *Chicago & R. I. R. Co. v. Still*, 19 Ill. 509; *Chicago & A. R. Co. v. Gretzner*, 46 id. 82; *Marcott v. M., H. & O. R. Co.* 49 Mich. 99. Failure to look before crossing a street car track will defeat a recovery in case of collision if the car was in plain sight and could have been seen. *Boerth v. West Side R. Co.* 87 Wis. 288; *Kelly v. Hendrie*, 26 Mich. 255; *Davenport v. Brooklyn C. R. Co.* 100 N. Y. 632; *McClain v. Brooklyn C. R. Co.* 116 id. 465; *Scott v. Third Ave. R. Co.* 59 Hun, 456; *Ewing v. Atlantic Ave. R. Co.* 11 N. Y. Supp. 626; *Harnett v. Bleecker St. & F. F. R. Co.* 49 N. Y. Super. Ct. 185; *Buzby v. Phila. Traction Co.* 126 Pa. St. 559; *Sheets v. Connolly St. R. Co.* 54 N. J. Law, 518; *Schulte v. N. O. C. & L. R. Co.* 44 La. Ann. 509; *Warner v. Peoples' St. R. Co.* 141 Pa. St. 615; *Wheelahan v. Phila. Traction Co.* 150 id. 187; *Ehrisman v. East Harrisburg C. P. R. Co.* id. 180; *Carson v. Fed. St. & P. V. R. Co.* 147 id. 219; *Thomas v. Cit. Pass. R. Co.*

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132 id. 504; *Ward v. Rochester E. R. Co.* 17 N. Y. Supp. 427; *Murray v. Pontchartrain R. Co.* 31 La. Ann. 490; *Follet v. Toronto St. R. Co.* 15 Ont. App. 346; *Thompson v. Thompson*, 77 Ga. 692, 697; *Metropolitan St. R. Co. v. Johnson*, 91 id. 466; *North Side St. R. Co. v. Want*, 4 Tex. App. Civ. Cas. 237; *Railroad Co. v. Gladmon*, 15 Wall. 401, 404, 409; *Adolph v. C. P., N. & E. R. R. Co.* 76 N. Y. 537; *Wood v. Detroit C. St. R. Co.* 52 Mich. 402; *Cowan v. Third Ave. R. Co.* 1 N. Y. Supp. 612; *Davidson v. Denver Tramway Co.* 35 Pac. Rep. 920. The maxim "*falsus in uno, falsus in omnibus*" only applies where a person knowingly testifies falsely. *Gottlieb v. Hartman*, 3 Colo. 60; *Buffalo Co. v. Van Sickle*, 16 Neb. 363; *Mack v. State*, 48 Wis. 271, 286; *Santissima Trinidad*, 7 Wheat. 283, 339, 340; *Pease v. Smith*, 61 N. Y. 477; *Wilkins v. Earl*, 44 id. 172; *Higgins v. People*, 58 id. 377.

For the respondent there was a brief by *McHugh, Lyons & McIntosh*, and oral argument by *Heber McHugh*. They contended, *inter alia*, that it is the duty of a street car driver to exercise the greatest care to avoid any collision or accident, especially at street crossings. He should exercise all the care that prudence may suggest in looking about and listening so as to assure himself that his track is clear and safe, and for his failure to do so his employer is responsible. *Heucke v. Milwaukee C. R. Co.* 69 Wis. 402; *Dahl v. Milwaukee C. R. Co.* 65 id. 376; Booth, St. Railways, 418; *Strutzel v. St. Paul C. R. Co.* 47 Minn. 543; *Shea v. St. Paul C. R. Co.* 50 id. 395; *Anderson v. Minneapolis St. R. Co.* 42 id. 490; *Baltimore C. P. R. Co. v. McDonnell*, 43 Md. 534; *Omaha St. R. Co. v. Duvall*, 58 N. W. Rep. 531; *Mayo v. B. & M. R. Co.* 104 Mass. 137; *Murphy v. Orr*, 96 N. Y. 14. As the motorman either did see, or by the exercise of slight diligence could have seen, the plaintiff's perilous condition in time to avoid the accident, she is entitled to recover. *Inland & S. C. Co. v. Tolson*, 139 U.

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S. 551; *Scott v. D. & W. R. Co.* 11 Ir. C. L. 377; *Woodward v. West S. St. R. Co.* 71 Wis. 625; *Austin v. N. J. Steamboat Co.* 43 N. Y. 82; *Heddles v. C. & N. W. R. Co.* 74 Wis. 239; *Morris v. C., B. & Q. R. Co.* 45 Iowa, 32; *Valin v. M. & N. R. Co.* 82 Wis. 1. Contributory negligence in order to defeat recovery must be the proximate cause, not the remote cause of the injury, and it is for the jury to determine whether the cause is remote or proximate. Therefore if there be negligence on the part of the plaintiff, yet if at the time when the injury was committed it might have been avoided by the defendent in the exercise of reasonable care and prudence, an action will lie for the injury. *Stucke v. M. & M. R. Co.* 9 Wis. 215; *Trow v. Vt. Cent. R. Co.* 24 Vt. 487; *Kline v. Cent. Pac. R. Co.* 37 Cal. 400; *Weymire v. Wolfe*, 52 Iowa, 533; *Walsh v. Miss. V. Transp. Co.* 52 Mo. 434; *Thirteenth & F. St. P. R. v. Broudrou*, 92 Pa. St. 475; *Pittsburgh, C. & St. L. R. Co. v. Conn*, 104 Ind. 64. Under the evidence in the case the court cannot say, as a matter of law, that the plaintiff was guilty of contributory negligence. Beach, Cont. Neg. § 290; *Thoresen v. La Crosse C. R. Co.* 87 Wis. 597; *Johnson v. L. S. T. & T. Co.* 86 id. 64; *Wells v. Brooklyn C. R. Co.* 58 Hun, 389; *Kellny v. Mo. Pac. R. Co.* 8 L. R. A. 783; *Shea v. St. Paul C. R. Co.* 50 Minn. 395; *Shea v. P. & B. V. R. Co.* 44 Cal. 414; *Spurrier v. Front St. C. R. Co.* 3 Wash. 659; *Swain v. Fourteenth St. R. Co.* 93 Cal. 179; *Dallas R. T. R. Co. v. Elliott*, 26 S. W. Rep. 455; *Will v. West S. R. Co.* 84 Wis. 42; *Quinn v. Atl. Ave. R. Co.* 12 N. Y. Supp. 223; *Chicago C. R. Co. v. Robinson*, 127 Ill. 9; *Haney v. Pittsburgh, A. & M. T. Co.* 159 Pa. St. 399. The failure to look and listen before crossing a street railway track is not, as matter of law, negligence. Beach, Cont. Neg. § 290; *Buzby v. Phila. Traction Co.* 126 Pa. St. 559; *Shea v. St. Paul C. R. Co.* 50 Minn. 395; *Anderson v. Minneapolis St. R. Co.* 42 id. 490; *McClain v. Brooklyn C. R. Co.* 116

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N. Y. 459; *Dallas R. T. R. Co. v. Dunlap*, 26 S. W. Rep. 877; *Chicago C. R. Co. v. Robinson*, 127 Ill. 9; *Dahl v. Milwaukee C. R. Co.* 65 Wis. 371; *Thoresen v. La Crosse C. R. Co.* 87 id. 597.

CASSODAY, J. The evidence on the part of the plaintiff tends to prove that she and another person were riding in a phaeton with Mrs. Jones, who was an experienced driver; that Mrs. Jones was siting on the right-hand side of the phaeton; that the horse was going west on a walk, between the curb of the street and the south rail of the south track; that a sprinkling wagon was approaching from the west, about a block away; that to avoid the sprinkling wagon the driver, Mrs. Jones, attempted to cross the defendant's tracks by turning and going diagonally in a northwesterly direction, at an angle of about forty-five degrees; that the horse had crossed the south track, and also the space between the two tracks, and the hind wheel of the phaeton was on the north track when the collision occurred; that the top of the phaeton was up; that there were no curtains on the sides; that before and after turning the driver and the plaintiff were both listening for a car; that just after so turning the driver looked back along the track a distance of about forty-five feet to see whether a car was approaching; that she saw no car; that just as she turned the plaintiff looked back along the track a distance of one hundred feet, and saw no car; that neither the plaintiff nor the driver nor the other person mentioned knew of the approach of the car, or heard any signal, until it was within eight or ten feet of the carriage; that the car was moving at an unlawful rate of speed,— to wit, exceeding ten miles an hour; that the collision occurred instantly after they discovered the car. The evidence on the part of the defendant tends to prove that the phaeton was at the time going nearly straight across the track; that the speed of

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the car at the time did not exceed five to seven miles per hour; that timely signals were given by those in charge of the car; and that the plaintiff and the driver could have seen the car in time to have avoided the injury, had they looked and listened as they should have done. We are constrained to hold that under the peculiar circumstances of this case the evidence was sufficient to justify the trial court in submitting the question of the defendant's negligence to the jury for determination.

Counsel for the defendant are undoubtedly right in contending, in effect, that a person approaching a railway track with the view of crossing the same is bound to use his eyes in looking and his ears in listening, and if he fails to do so and is injured in consequence, then he cannot recover, even though the defendant was guilty of a want of ordinary care. The decisions of this court to that effect are too numerous to mention. But, under the peculiar circumstances of this case, we are constrained to hold that the evidence was sufficient to justify the trial court in submitting to the jury for determination the question of contributory negligence.

Among other things, the court charged the jury that: "If you find a witness — conclude a witness — has *testified falsely* as to *any* material fact in the case, *you are permitted to disregard all of that witness's testimony, unless it is supported by* other evidence." This instruction authorized the jury to disregard all the uncorroborated testimony of any witness if they reached the conclusion that he had, even through inadvertence or mistake, sworn falsely as to any material fact. This was error. As a general rule the question of the credibility of witnesses is for the jury. If they find that a witness has testified falsely as to a material fact, they are, of course, at liberty to disregard such false testimony. But before they should apply the maxim, "False in one thing, false in all things," they should find

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that the witness knowingly or intentionally or corruptly swore falsely as to a material fact. *Mercer v. Wright*, 3 Wis. 645; *Morely v. Dunbar*, 24 Wis. 185, 189; *Loucheine v. Strouse*, 49 Wis. 624; *Black v. State*, 59 Wis. 471; *People v. Evans*, 40 N. Y. 5; *Pease v. Smith*, 61 N. Y. 483; *People v. Chapleau*, 121 N. Y. 276. The maxim was apparently founded upon the old rule which rendered a witness convicted of wilful perjury incompetent to testify at all. That rule has in this state been abolished by statute, although the fact may be shown to affect his credibility. R. S. sec. 4073. In view of this change in the rule it would seem that the court should in no case take the question as to the credibility of a witness from the jury. *Mack v. State*, 48 Wis. 286.

The portion of the charge quoted was followed by this: "After all, gentlemen, there is, when a witness is testifying, an *indefinable something that rings of truth*, that *in spite of* and *in the face of everything* you have a right and should give heed to." This made it the duty of each juryman to define for himself this "indefinable something," and then to give heed to it, "in spite of and in the face of everything" else, which, in his mind, may have included a preponderance of the evidence. This was an invasion of the province of the jury. Besides, it gave them an intangible and unwarranted license, and hence was misleading. "Every party to an action at law in this state has a right to insist upon a verdict or finding based upon the law and the evidence in the case, and not, in the absence of evidence, upon mere inference, conjecture, and personal experience." *Sherman v. Menominee R. L. Co.* 77 Wis. 22. True, the jury were told that the verdict must be based upon the evidence given in the case, and upon nothing else. But this did not cure the error. *Sears v. Loy*, 19 Wis. 96; *Imhoff v. C. & M. R. Co.* 20 Wis. 344. The two instructions were inconsistent, and tended to confuse the jury. *Ibid.*

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There is another portion of the charge justly subject to criticism. It is this: "Although plaintiff might not have exercised ordinary care in turning upon the track, still if the motorman *saw her* so in danger and unconscious of peril, and thereupon failed to exercise *ordinary care* to avoid the collision, and such *want of ordinary care* was the proximate cause of the injury, plaintiff should recover." If the motorman so saw the plaintiff in such danger and unconscious of her peril, and might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence, but failed to do so, then such failure was something more than a want of ordinary care on his part, and amounted to wanton or reckless conduct, as indicated in the portion of the charge following the part quoted. *Inland & S. C. Co. v. Tolson*, 139 U. S. 551, 558; *Valin v. M. & N. R. Co.* 82 Wis. 16. Certainly, a plaintiff cannot recover where both parties are equally guilty of a mere want of ordinary care — otherwise, contributory negligence would not be a defense.

By the Court.— The judgment of the superior court of Douglas county is reversed, and the cause is remanded for a new trial.

CADDEN, Respondent, vs. AMERICAN STEEL BARGE COMPANY, Appellant.

October 3 — October 23, 1894.

Master and servant: Injury from improperly placed scaffold: Fellow-servants: Evidence of custom: Contributory negligence.

1. Plaintiff was injured while working for defendant as a riveter on a "whaleback" vessel, by reason of the improper and dangerous manner in which a scaffold had been suspended and adjusted for him to work upon. It was the custom and understanding that all scaffolds should be supplied for the riveters by the defendant, and

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placed in position and adjusted by men employed by defendant for that special purpose and doing the work under its supervision, and that the riveters should give them no assistance or directions except to indicate where the scaffolds should be placed. *Held*, that the scaffold builders were not fellow-servants with plaintiff, but were charged with the duty which defendant owed him of providing a safe place for him to work, and hence their negligence in that respect is the negligence of the defendant.

2. The testimony of a witness as to the custom in respect to the relation between the scaffold builders and the riveters was properly excluded, where it appeared that he knew only what defendant's superintendent had told him.

3. The evidence — showing among other things that plaintiff was not present while the scaffold was being placed; that he was told by the scaffold builders that it was all right; that before getting down upon it he looked over the side of the vessel to see if it was all right, and it appeared to be so; and that two other persons, who viewed it from different directions, testified that it tipped the wrong way — is *held* to sustain a finding by the jury that plaintiff was not guilty of contributory negligence.

APPEAL from the Superior Court of *Douglas* County.

This action was brought by the plaintiff to recover the damages sustained by him while in the employ of the defendant, alleged to have been caused by its negligence. The defendant owned and operated the American Steel Barge Works at Superior, for building the vessels known as "Whalebacks;" and at the time of the injury of which the plaintiff complained, June 28, 1892, he was in defendant's employ as a riveter in and about its works. In his said employment it was the plaintiff's duty to go upon an elevated scaffold or platform on and along the side of a certain whaleback to work as a riveter thereon; and it is alleged that it was the defendant's duty to procure and furnish, for the use of the plaintiff, a good, safe, and secure scaffold upon which to stand while so at work; that the defendant, by two persons employed by it to erect and suspend said scaffold and put it in order, performed said work in a negligent, unskilful, and unsafe manner, of which

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the defendant had notice, but its unsafe and dangerous condition was unknown to the plaintiff, and the defendant negligently omitted to warn the plaintiff thereof; that while the plaintiff was on the said scaffold in his said employment, by reason of its unsafe and dangerous condition it tipped up to one side, without fault on his part, whereby the plaintiff was thrown from the same down to the dock, a distance of twenty feet, and severely injured, to his damage, etc. The defendant denied the alleged negligence, and that it provided or furnished any unsafe, defective, or insufficient scaffolding, or that the plaintiff was injured thereby, and alleged that he was injured by and through his own fault and negligence.

Upon a trial before the court and a jury, a special verdict was found: (1) That the plaintiff in June, 1892, while in the employ of the defendant, fell from a suspended scaffold and received injuries. (2) That there was a crew of men employed by defendant whose exclusive duty it was to construct or place scaffolding where and when called upon by the workmen employed in building barges. (3) That it was the custom and understanding that the scaffold builders should receive no suggestions, directions, or assistance as to and in constructing or placing in position the scaffolds, but should themselves, without interference or assistance from the workers calling for the scaffolds, construct and place the same. (4) That in the present case the plaintiff did not erect or assist as to placing or adjusting the scaffold from which he fell. (5) That the persons who placed the scaffold in position did not exercise ordinary care in so doing. (6) That the scaffold, as left by those who placed it, was not in a position reasonably safe for the purposes for which it was to be used. (7) That the plaintiff did not know, and in the exercise of ordinary care would not have known, of the unsafe character of the scaffold before his fall and in season to avoid the danger. (8) After the plaintiff got on

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the scaffold, he exercised ordinary care for his own safety. (9) Scaffolds and appliances of the kind of the one in question were not in general use in the defendant's yards for a length of time prior to the accident. (10) They were not used for a length of time for the convenience of the riveters. Plaintiff's compensation for the injury was fixed at $3,250.

The court made findings of facts on certain other questions from the evidence, by consent of the parties, in substance that Mongela and Johnson, employees of defendant and members of scaffold building crews, were the only persons who aided or directed in building or erecting and suspending the scaffold in question; that the want of ordinary care on their part in building, erecting, and suspending the scaffold was the proximate cause of plaintiff's injuries; and that the defendant retained supervision over the building and erecting and suspending the scaffold in question, and over the men who erected the same.

Judgment was given in favor of the plaintiff and against the defendant for said $3,250 and costs, from which the latter appealed. Such other facts as are material are stated in the opinion.

For the appellant there was a brief by *Kennedy & Burnett*, and oral argument by *E. C. Kennedy*. They contended, *inter alia*, that there is no evidence that the defendant retained any supervision whatever over the erection or placing in position of this scaffold. No person other than the one for whose use the scaffold was erected had or exercised any authority as to the erection of the scaffold, or placing the same in position. The negligence of the scaffold builders in such a case is that of a fellow-servant, for which the master is not liable. *Peschel v. C., M. & St. P. R. Co.* 62 Wis. 338; *Armour v. Hahn*, 111 U. S. 313; *Johnson v. Ashland W. Co.* 77 Wis. 51; *Webber v. Piper*, 109 N. Y. 496; *Dwyer v. Am. Exp. Co.* 32 Wis. 307; *Ling v. St. P., M. &*

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M. R. Co. 50 Minn. 160; *Kelley v. Norcross*, 121 Mass. 508; *Porter v. Silver C. & M. C. Co.* 84 Wis. 418; *Killea v. Faxon*, 125 Mass. 485; Buswell, Pers. Inj. § 217, and cases cited; *Butler v. Townsend*, 126 N. Y. 105; *Burns v. Sennett*, 99 Cal. 363. The mere fact that the scaffold builders were negligent in allowing the scaffold to tip outward when suspended, is not sufficient to charge the defendant with negligence in the employment of the scaffold builders. *Cooper v. M. & P. du C. R. Co.* 23 Wis. 668; *Baulec v. N. Y. & H. R. Co.* 59 N. Y. 356; Bailey, Master's Liability, 55 *et seq.* The danger attending the tipping of the scaffold outward while the inner edge rests upon an oval surface arises from the ordinary operation of familiar laws of gravitation; and the plaintiff in this case, in view of the experience he had had, must be presumed to be acquainted with such laws. If he failed to observe the operation of these laws, the risk was his own and not that of defendant. *Walsh v. St. P. & D. R. Co.* 27 Minn. 367; *Keene v. Detroit C. & B. R. Mills*, 66 Mich. 277; *Melzer v. Peninsular Car Co.* 76 id. 94; *Sweet v. Ohio C. Co.* 78 Wis. 127; *Hobbs v. Stauer*, 62 id. 108; *Naylor v. C. & N. W. R. Co.* 53 id. 661; *Goltz v. M., L. S. & W. R. Co.* 76 id. 136; *Peffer v. Cutler*, 83 id. 281; *Nixon v. Selby S. & L. Co.* 102 Cal. 458.

For the respondent there was a brief by *Mills & Dahl*, and oral argument by *E. T. Mills*. They argued, among other things, that where it has become the custom and practice of defendant to erect scaffolds for its riveters, and a contract is made with that custom in view, and defendant undertakes to erect a scaffold by a separate crew over which it retains supervision, and whose exclusive duty it is to suspend scaffolds, a riveter is not a fellow-servant with the scaffold builders. *Sims v. Am. S. B. Co.* 57 N. W. Rep. 322; *Conner v. Pioneer F. P. Const. Co.* 29 Fed. Rep. 629; *Brabbits v. C. & N. W. R. Co.* 38 Wis. 289; *Johnson v. First Nat. Bank*, 79 id. 414; *Van den Heuvel v. Nat. F. Co.* 84 id. 636;

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Bessex v. C. & N. W. R. Co. 45 id. 477; *Hulehan v. G. B., W. & St. P. R. Co.* 68 id. 520; *Phillips v. C., M. & St. P. R. Co.* 64 id. 475; *Heine v. C. & N. W. R. Co.* 58 id. 531; *McClarney v. C., M. & St. P. R. Co.* 80 id. 278; *Dwyer v. Am. Exp. Co.* 82 id. 307; *Shultz v. C., M. & St. P. R. Co.* 40 id. 589; *Smith v. C., M. & St. P. R. Co.* 42 id. 520; 1 Shearm. & Redf. Neg. § 205; *Behm v. Armour*, 58 Wis. 1; *Benzing v. Steinway*, 101 N. Y. 547; *Smith v. Peninsular Car Works*, 60 Mich. 501; *Arkerson v. Dennison*, 117 Mass. 408; *Sherman v. Menominee R. L. Co.* 72 Wis. 122; *Laning v. N. Y C. R. Co.* 49 N. Y. 521; 7 Am. & Eng. Ency. of Law, 830; *Fuller v. Jewett*, 80 N. Y. 46; *Kirkpatrick v. N. Y. C. & H. R. R. Co.* 79 id. 240; *Green v. Banta*, 48 N. Y. Super. Ct. 156; *Kain v. Smith*, 89 N. Y. 375; *Devlin v. Smith*, id. 470; *Manning v. Hogan*, 78 id. 615; *Mulchey v. Methodist R. Soc.* 125 Mass. 487; *Pullman P. C. Co. v. Laack*, 143 Ill. 242; *Northern Pac. R. Co. v. Charless*, 51 Fed. Rep. 562; *Denning v. Gould*, 157 Mass. 563; *McLean v. Standard O. Co.* 21 N. Y. Supp. 874; *Ernst v. Brown H. & C. Co.* 24 id. 359; *Cougle v. McKee*, 151 Pa. St. 602; *Foster v. Mo. Pac. R. Co.* 115 Mo. 165; *Haworth v. Seevers Mfg. Co.* 51 N. W. Rep. 68; *Kelly v. Erie T. & T. Co.* 34 Minn. 321; *Heckman v. Mackey*, 35 Fed. Rep. 353. Plaintiff had a right to assume that the scaffold was safe, especially after being told so, and he did not know its unsafeness. He had a right to assume that it was fastened with a proper lateral support in such a manner that it would not give way. From where he stood he could not tell whether it rested against the oval or perpendicular surface of the boat. The assumption of the risk was a question for the jury. *Bessex v. C. & N. W. R. Co.* 45 Wis. 477; *Cole v. C. & N. W. R. Co.* 67 id. 272; *Clapp v. M. & St. L. R. Co.* 36 Minn. 6; *Piette v. Bavarian B. Co.* 91 Mich. 605; 14 Am. & Eng. Ency. of Law, 854; *Shultz v. C., M. & St. P. R. Co.* 40 Wis. 589; *Ditberner v. C., M. & St. P. R. Co.* 47

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id. 138; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642; *Kellogg v. C. & N. W. R. Co.* 26 Wis. 223; *Grannis v. C., St. P. & K. C. R. Co.* 81 Iowa, 444; *Johnson v. First Nat. Bank*, 79 Wis. 414; *Elledge v. N. C. & O. R. Co.* 100 Cal. 282; *Nixon v. Selby S. & L. Co.* 102 id. 458.

PINNEY, J. 1. There does not appear to have been much dispute in respect to the facts, and the verdict of the jury is, we think, sustained by sufficient evidence. It shows that the custom and practice was that all scaffolds were supplied for the riveters by the defendant company, and there were men there under its control for the special purpose of building and placing them in the positions directed by the riveters. With this the riveters had nothing whatever to do, beyond telling them where they wanted the scaffolds placed. The scaffold was constructed of two planks nailed upon crosspieces at each end, with ropes attached to the crosspieces on the inside and outside to suspend it, and these were fastened to stanchions above the deck. The inner ropes lay flat against the side of the boat, which curved inward. It was necessary that the outer side of the scaffold should be the highest, so that it would tip toward the side of the boat and rest securely against it. It appeared that the accident was caused by the improper and dangerous manner in which the scaffold was suspended and adjusted, so that it tipped outward and to the dock; and in consequence, when the plaintiff got upon it, the inner side of the scaffold slipped up the side of the boat, and rested flatwise on its side, instead of its edge resting securely against it, whereby the plaintiff was thrown upon the dock below.

2. The ruling of the court excluding the testimony of the witness Rogers as to the custom of the defendant relative to the control of the scaffold builders was properly made. It did not appear that he was sufficiently qualified to tes-

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tify on the subject. He said, in substance, that he learned the custom from the defendant's superintendent when he (witness) took charge as foreman of the carpenters, about six months before the accident; that they were told the scaffold builders were to do whatever they told them, and whenever they told them. He did not profess to have any knowledge as to the relation between the scaffold builders and riveters, or, indeed, of any custom at all. He knew simply what the superintendent had told him.

3. It is contended that the plaintiff was guilty of contributory negligence in going upon the scaffold in the manner in which it had been adjusted and suspended, but the verdict of the jury, upon sufficient and competent evidence, has found on this point in favor of the plaintiff. It appears that, after the plaintiff had riveted up the side of the whaleback three or four feet, he directed the scaffold builders to raise the scaffold up so the hatch could be finished, and they began doing so, when he left to take some chisels to be sharpened. He returned after an absence of fifteen minutes, and the scaffold builders were about leaving just as he came on deck, within about 100 or 150 feet from where the scaffold was hung. He asked one of them (Johnson), "Is that scaffold all right now?" and he said, "Yes." He looked no further until he got down to where the scaffold was, and then down to the scaffold, and then he looked over to see if it was in its right place, and it appeared to be. He then had to slide down over the side of the whaleback six or seven feet to get upon it. He testified that he always took a look at a swinging scaffold before going upon it, to see if it was all right, and took a look at this one. "It appeared to me to be all right, over where I was standing." Two witnesses, viewing it from different directions, testified that the scaffold tipped out over the dock, when it should have tipped toward the side of the boat in order to be secure and safe. There was

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sufficient evidence to sustain the verdict of the jury on this question, as well as others; and the trial judge was satisfied with the verdict and denied a motion for a new trial made on the ground that the verdict was contrary to evidence. We cannot interfere with the finding.

4. The verdict of the jury, as well as the evidence, is clearly to the effect that, as between the plaintiff and defendant, it was its duty to furnish him with proper scaffolds, securely and safely placed, where he could safely work for it in riveting upon the sides of the whaleback in question, and they were to be suspended along the side of the boat wherever and whenever he indicated, to enable him safely to prosecute his work. This "was the custom and understanding." He had no other control over or relation to them, and they were in all other respects under the control of the superintendent of the defendant, under whom it was their exclusive duty to build and so place such scaffolds. The contention of the defendant's counsel that the plaintiff and the scaffold builders were fellow-servants of the defendant, engaged in a common service or employment, and that the defendant was therefore not liable to the plaintiff for damages caused to him by the negligence of the scaffold builders in not safely and securely placing and suspending the scaffold in question, cannot, we think, be sustained. It is entirely plain that, as between the defendant and the plaintiff, it was its duty to furnish him a proper and safe place to work as a riveter on and along the side of the whaleback. The scaffold builders were not engaged in the common service or employment of the plaintiff, but in an entirely different service, namely, in discharging for the defendant, under its direction, the duty it owed as master to the plaintiff as its servant. For any damages caused by the neglect of this duty, the master is clearly liable; and, while he may delegate the performance of the duty to other employees, he cannot thereby escape from liability for its

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nonperformance. If they are negligent or fail to discharge his duty properly, their neglect is to be imputed to him, and the liability on his part still remains. The scaffold builders were not, in the true sense of the rule relied on, fellow-servants with the plaintiff, who was using the scaffold, but were charged with the duty of the master to the servant, and were therefore engaged in a distinct and independent department of service. This view, we think, is decisive of the case, and shows that the injury the plaintiff sustained is the result of what in law must be regarded as the negligence of the defendant.

The distinction between this case and most of those cited by the appellant's counsel is noticed in *Peschel v. C., M. & St. P. R. Co.* 62 Wis. 343–347, and consists in the fact that here the defendant was not merely to furnish materials for the scaffolds and men to build them, leaving the application of the materials or adjustment and placing of the scaffolds to the plaintiff and other employees of the defendant, as in that case and in *Armour v. Hahn*, 111 U. S. 313, and other cases cited, but here the defendant was bound to properly place or suspend the scaffold in position for the plaintiff to work thereon; for it is found that "it was the custom and understanding that the scaffold builders should receive no suggestions, directions, or assistance as to or in constructing or placing in position the scaffolds, but should themselves, without interference or assistance from the workers calling for the scaffolds, construct and place the same;" and it is further found that the defendant retained supervision over the building, erecting, and suspending the scaffolds in question, and the men who erected the same. The principle in question is a familiar one, and sustained by numerous decisions. We cannot doubt its applicability to the present case. *Bessex v. C. & N. W. R. Co.* 45 Wis. 477; *Hulehan v. G. B., W. & St. P. R. Co.* 58 Wis. 319; *McClarney v. C., M. & St. P. R. Co.* 80 Wis. 280. In *Dwyer v. Am. Exp. Co.* 82 Wis. 307, it was held that the question whether dif-

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ferent employees of the same master are to be regarded as fellow-servants in a common employment depends upon the nature of the act in the performance of which the injury was inflicted, without regard to the rank of the negligent servant, and that the master is not liable unless the negligent act pertained to a matter in respect to which he owed a direct duty to the servant injured. In that case the doctrine is approved that, if the act is one it is the duty of the master to perform, then the offending employee is not a servant, but an agent, and the real effect of the rule which is acted on in *Brabbits v. C. & N. W. R. Co.* 38 Wis. 289, and *Schultz v. C., M. & St. P. R. Co.* 48 Wis. 375, is to make any servant of the company who is charged with the performance of any duty which the master owes its servants a vice-principal in respect thereto.

If it could be said that the duty of the master ended with furnishing proper scaffolds, ready to be adjusted, and that they were to be suspended and adjusted by the plaintiff, or by him in company with others, his co-employees, we think the defendant would not be liable for the plaintiff's injury; but, under the finding, it is clear that the plaintiff was not to have, and did not have, anything to do with placing the scaffold, but that this duty was devolved on the defendant, and whether by custom or by agreement is not material. The fact that the plaintiff was to indicate where it was to be placed, or had a right to object that it was not properly suspended or adjusted, does not affect the result. He certainly had a right to call on the defendant to do its duty, and to object that it had not been properly performed. Under the facts found, in view of the duty of the defendant to suspend and adjust the scaffold properly, it became, in our opinion, a *place*, as distinguished from a mere *appliance*, which the defendant was bound to furnish the plaintiff, though changing in location with the exigencies of the work; and it was its duty to see that it was in a reasonably safe and proper condition to enable

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the plaintiff to work thereon. The plaintiff did not take the risk of the carelessness of those who were selected by the defendant and undertook to do its duty, even though they were the servants of the same master. This view of the case is in accordance with former decisions of this court and a great preponderance of authority. The subject has recently received elaborate and careful consideration in the supreme court of the United States, particularly in *Northern P. R. Co. v. Herbert*, 116 U. S. 642; *Hough v. Railway Co.* 100 U. S. 213; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 387, and *Union P. R. Co. v. Daniels*, 152 U. S. 684, 688. In *Sims v. Am. Steel Barge Co.* (Minn.) 57 N. W. Rep. 322, where the facts were quite the same as in the present case, a similar conclusion was reached; and so in *Conner v. Pioneer F. P. Const. Co.* 29 Fed. Rep. 629. That the plaintiff and the scaffold men or crew were not fellow-servants in the employ of the defendant and engaged in a common service or employment, within the meaning of the rule invoked by counsel of the defendant, is maintained in very many quite recent cases in the courts of other states. *Ford v. Fitchburg R. Co.* 110 Mass. 240, 260; *Kelley v. Norcross*, 121 Mass. 508; *Lawless v. Conn. R. R. Co.* 136 Mass. 1; *Sadowski v. Mich. Car Co.* 84 Mich. 105; *Roux v. Blodgett & D. L. Co.* 94 Mich. 615; *Louisville, N. A. & C. R. Co. v. Graham*, 124 Ind. 89; *Wilson v. Willimantic Linen Co.* 50 Conn. 433; *Lewis v. Seifert*, 116 Pa. St. 628; *Fuller v. Jewett*, 80 N. Y. 46; *Crispin v. Babbitt*, 81 N. Y. 516; *Benzing v. Steinway*, 101 N. Y. 547; *Jaques v. Great Falls Mfg. Co.* (N. H.) 22 Atl. Rep. 552; *Shanny v. Androscoggin Mills*, 66 Me. 426. The case of *Burns v. Sennett*, 99 Cal. 363, is one where, by the contract, the servant and certain of his fellows were to adjust the appliances by which the work was to be done, and is plainly inapplicable.

We find no reversible error in the record.

By the Court.—The judgment of the superior court of Douglas county is affirmed.

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LOFDAHL, by guardian *ad litem*, Respondent, vs. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Appellant.

October 3 — October 23, 1894.

Railroads: Injury to person on track: Contributory negligence.

A boy, sixteen years old and familiar with railway trains, who deliberately placed himself upon a railway track twenty feet in front of, and with his back towards, an engine which he knew was liable to move at any time, was guilty of contributory negligence precluding a recovery for an injury caused by negligence (which was not gross or wanton) in moving such engine; and it is immaterial whether he was at the time upon a licensed way or was a mere trespasser on the track.

APPEAL from the Circuit Court for *Polk* County.

This action is to recover for personal injuries. The defendant's railroad runs due east and west through the village of Amery. A side track extends parallel with the main track and a few feet distant therefrom nearly the entire distance through the village. A street named Keller avenue extends up to the right of way from the north, at right angles with the right of way and track. From the end of this street a licensed way exists across both tracks and right of way to the south. The depot and passenger platform are just west of this licensed way. The accident happened in the daylight on the morning of May 7, 1888, and the plaintiff was nearly sixteen years of age. A gravel train had just come in from the east and stopped on the side track near the depot. The plaintiff had been waiting for this train, and got onto it, intending to ride to Dresser Junction, a station west of Amery. While he was on the gravel train a freight train came in from the west on the main track, and stopped, the engine being near the depot. The plaintiff saw it. He had been much around railroad trains and depots. Just after it came in the con-

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ductor or brakeman put him off the gravel train. He got off on the north side, next the main track, and stepped over with one foot on the main track, about fifteen or twenty feet in front of the freight engine, and, as he claims, on the aforesaid licensed way, having an angry altercation with the man who put him off the train. He stood with his back to the freight engine. While he was so standing the fireman of the freight engine, during the temporary absence of the engineer, moved the engine forward a short distance, and ran over plaintiff's foot, making amputation necessary.

The foregoing facts are either undisputed or taken from the plaintiff's own evidence. There was evidence that no signals were given. On the part of the defendant there was evidence that plaintiff was not on the licensed way, but at a point considerably east thereof, on the right of way.

The jury found a special verdict in substance as follows: (1) That no signal was given before the moving of the freight engine; (2) that a licensed way existed across the right of way, being a continuation of Keller avenue; (3) that plaintiff was injured within the limits of this licensed way; (4) that the fireman who moved the freight engine had reasonable ground to expect that a person might probably be on the track where plaintiff was, when he moved the engine; (5) that he did not exercise ordinary care when he moved the engine; (6) that his want of ordinary care was the proximate cause of the injury; (7) that plaintiff was not guilty of contributory negligence; (8) that plaintiff's damages were $4,000. A motion to set aside the verdict and for a new trial was overruled by the court, and from judgment for the plaintiff the defendant appealed.

For the appellant there was a brief signed by *Henry B. Dike*, attorney, and *Alfred H. Bright* and *Geo. B. Young*, of counsel, and the cause was argued orally by *Mr. Bright*.

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They argued, among other things, that the plaintiff's negligence conclusively appears from his own showing. *Delaney v. M. & St. P. R. Co.* 33 Wis. 67; *Nicholson v. Erie R. Co.* 41 N. Y. 524; *Railroad Co. v. Depew*, 40 Ohio St. 121; *Bryson v. C., B. & Q. R. Co.* 57 N. W. Rep. 430; *Ill. Cent. R. Co. v. Hall*, 72 Ill. 222; *Goldstein v. C., M. & St. P. R. Co.* 46 Wis. 404; *Haas v. C. & N. W. R. Co.* 41 id. 44; *Randall v. N. W. Tel. Co.* 54 id. 149; *Williams v. C., M. & St. P. R. Co.* 64 id. 1.

For the respondent there was a brief by *George D. McDill* and *Butts & Jaques*, and oral argument by *Charles J. Butts*. They contended, *inter alia*, that the party who last had an opportunity to avoid the injury, notwithstanding the negligence of the other, is alone liable for it. Shearm. & Redf. Neg. §§ 61 and note 1 (p. 86), 99, 483 and note 1 (p. 295), 484; *Bostwick v. M. & P. R. Co.* 2 N. Dak. 440; 2 Thomp. Neg. 1157, note 1; *R. Co. v. Kassen*, 34 Cent. L. J. 364; *Clampit v. C., St. P. & K. C. R. Co.* 84 Iowa, 71; *Guenther v. St. L., I. M. & S. R. Co.* 95 Mo. 286; *Gates v. B., C. R. & M. R. Co.* 39 Iowa, 45; *Chicago, B. & Q. R. Co. v. Wymore*, 58 N. W. Rep. 1120; *Chicago, B. & Q. R. Co. v. Wilgus*, id. 1125; *Cit. St. R. Co. v. Steen*, 42 Ark. 321; *Hicks v. Pacific R. Co.* 64 Mo. 436; *Scoville v. H. & St. J. R. Co.* 81 id. 434; *Welsh v. Jackson Co. H. R. Co.* id. 471; *Cadmus v. St. L. B. & T. Co.* 15 Mo. App. 86; *Eckert v. St. L., I. M. & S. R. Co.* 13 id. 352; *Werner v. Cit. R. Co.* 81 Mo. 368; Whart. Neg. (2d ed.), § 343; *Davis v. C. & N. W. R. Co.* 58 Wis. 649, 650.

WINSLOW, J. Upon the authority of the case of *Delaney v. M. & St. P. R. Co.* 33 Wis. 67, we must hold, upon the plaintiff's own evidence in this case, that he was guilty of contributory negligence. He was almost sixteen years of age, and familiar with railway trains and the conduct of railway business. He deliberately placed himself upon a

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railway track, twenty feet in front of an engine which he knew was liable to move at any time, with his back to the engine. It would be difficult to imagine a plainer case of negligence. Whether he was upon the licensed way, or was a mere trespasser upon the right of way, the result is the same. Such conduct cannot be made ordinary care, even by the verdict of a jury.

It was argued that the judgment should be affirmed, notwithstanding the plaintiff's negligence, because the negligence of defendant's servants was "gross and wanton." No such issue was submitted to the jury, nor was any such fact found by the jury. Neither can we say that the uncontradicted evidence established gross or wanton negligence. This contention, therefore, cannot prevail.

By the Court.— Judgment reversed, and action remanded for a new trial.

WILLE, Respondent, vs. BARTZ and another, Appellants.

October 3 — October 23, 1894.

Right of way: Gates.

The owner of land subject to a right of way may maintain a gate across the way, if such gate is necessary to the reasonable use and enjoyment of his land and does not unreasonably interfere with the use of the way.

APPEAL from the Circuit Court for *Rock* County.

The plaintiff brought her action in justice's court against the defendants, *Julius Bartz* and *David Green*, for trespass on her freehold in Fulton, Rock county, lying on and along the east side of the public highway, in breaking down and removing a certain gate thereon between her lands and the lands of her husband immediately adjoining on the south,

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and lying on and along said highway. The defendants, after setting up various matters in defense, interposed a plea of title to the *locus in quo*, and thereupon the action was certified to the circuit court for trial.

Trial of the issues by jury was waived, and, after hearing, the circuit court found, in substance, that April 1, 1890, one Saxby was the owner in fee of the premises in question, with other lands on the east thereof; that April 12, 1890, he sold and conveyed to Otto Schmelling the east five acres, being a strip fifty-two rods in length north and south, by fifteen rods six and one-third feet east and west, "together with the right of way, one rod wide, extending from the southwest corner of said five acres west along the north line of land owned by William Wille, to the public highway;" that April 20, 1890, said Saxby conveyed to the defendant *Julius Bartz* the remainder of said land, and adjoining that sold to Schmelling, of the same length and breadth, "excepting and reserving a right of way one rod wide along the south side thereof, and also including a right of way one rod wide from the southwest corner of said land, along and adjoining land of William Wille, to the public highway;" that on the 19th of July, 1890, said Saxby sold and conveyed to Elizabeth Green the east five acres of that part of said land still owned by him, of the length and width of that conveyed to *Bartz*, with a right of way one rod wide from the southwest corner of said five acres west to the highway, and excepting and reserving to all persons a right of way one rod wide on the south side of said five-acre tract; that on the 9th of October, 1890, Saxby sold and conveyed to Harry F. McLean the east part of that part of said lands then owned by him, and next adjoining that sold to Elizabeth Green, being of the same length and width as that sold to Schmelling, excepting a right of way one rod wide across the south end of said premises next to said Wille's land, and including a

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right of way one rod wide from the southwest corner of said premises west to the highway; that on the 20th of April, 1892, Saxby sold, by contract, to the plaintiff the remaining part of said tract owned by him, and west of and adjoining that sold to said McLean, and extending to said highway on the west, excepting and reserving therefrom a right of way one rod wide along the south side thereof along the land of said William Wille; that all of said lands above mentioned were and are used for agricultural purposes only; that plaintiff's husband has a dwelling upon his land, located just south of the lands sold to the plaintiff by said Saxby, which he occupied with his family, and that there is no dwelling house upon either of said other pieces; that the public highway on the west of said lands passed from Indian Ford to Edgerton, but there was no highway on the east thereof; that a gate of the width of thirteen feet four inches had been maintained, since the spring of 1890, across the said right of way where the same enters said highway; that, after the plaintiff purchased her said parcel of land from Saxby, she caused a sliding and swing gate made of fence boards to be erected across said right of way and upon her east line, and it was by force and arms broken down and removed by the defendants, June 3, 1892; that it had a clear opening between posts of eleven feet and eight inches, and was amply wide for all purposes for which said lands, and each parcel thereof, had been and were used; that before its erection the plaintiff's husband had been notified by the defendants that they must not suffer their stock to pass over said right of way to and upon the land on the east, occupied by them, and to prevent said stock from so passing said gate was erected and maintained, and that there had not been at any time a fence along the north boundary of said right of way, and when the gate was erected, as well as when broken down by the defendants, there was no fence be-

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tween land owned by the plaintiff and that owned on the south by her husband, William Wille; that the erection and maintenance of said gate was reasonable and necessary to the reasonable use and enjoyment of the plaintiff's land, and did not unreasonably interfere with the use of said right of way by the defendants; and that their acts in breaking down and removing it damaged the plaintiff in the sum of ten cents.

As conclusions of law it was found that the plaintiff had a right to erect and maintain the gate where the same was located, and that the act of the defendants in breaking down and removing it was illegal and wrongful, and that the plaintiff was entitled to recover the sum of ten cents for her damages, with costs to be taxed; and judgment was entered accordingly, from which the defendants appealed. The record does not contain any bill of exceptions setting forth the evidence or the defendants' exceptions to the findings.

For the appellants the cause was submitted on the brief of *Doe & Sutherland* and *T. S. Nolan.*

For the respondent there was a brief by *J. P. Towne* and *Winans & Hyzer*, and oral argument by *John Winans.* To the point that the erection of the gate by the plaintiff was lawful, they cited *Whaley v. Jarrett*, 69 Wis. 613; *Brill v. Brill*, 108 N. Y. 511; *Huson v. Young*, 4 Lans. 63; *Bakeman v. Talbot*, 31 N. Y. 366; *Baker v. Frick*, 24 Am. Rep. 506; *Sizer v. Quinlan*, 82 Wis. 390.

PINNEY, J. 1. The finding of facts upon questions depending upon the weight of evidence, or upon what it establishes, will not be disturbed where the bill of exceptions does not show that it contains all the evidence given at the trial (*Daskam v. Beemer*, 64 Wis. 13); and exceptions to the finding as to the facts are not available on appeal unless incorporated in the bill (*Hoey v. Pierron*, 67 Wis.

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263; *Koenigs v. Jung*, 73 Wis. 178). In such cases the only question in this court is whether the pleadings and findings sustain the judgment. *Blossom v. Ferguson*, 13 Wis. 75; *Cramer v. Hanaford*, 53 Wis. 85; *Edleman v. Kidd*, 65 Wis. 18.

2. The pleadings and facts found clearly sustain the judgment. The defendants had easements over the *locus in quo*, but the fee remained in Saxby, and subsequently passed to the plaintiff. Their rights are confined to a reasonable use of the way secured by the deeds from Saxby, the common grantor of both parties, in view of all the circumstances of the case and the use made of the premises affected by them. It is expressly found that the erection and maintenance of the gate was reasonable and necessary to the reasonable and necessary use and enjoyment of the plaintiff's land, and that it did not unreasonably interfere with the use of the right of way by the defendants. *Whaley v. Jarrett*, 69 Wis. 613; *Johnson v. Borson*, 77 Wis. 593; *Brill v. Brill*, 108 N. Y. 511, 517; *Sizer v. Quinlan*, 82 Wis. 390, 392. The latter case holds, as well, that the owner of the easement may not fence in the way and thereby exclude the owner of the fee from such uses as he may make of his land not inconsistent with the easement. The acts of the defendants in breaking down and removing the gate were therefore wrongful, and judgment was rightly given in favor of the plaintiff for her damages and costs.

By the Court.— The judgment of the circuit court is affirmed.

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IRWIN, Respondent, vs. RICHARDSON and another, imp., Appellants.

October 3 — October 23, 1894.

Flowage of land: Pleading: Action at common law or under mill-dam act?

1. The complaint in this action, stating facts sufficient to constitute a cause of action in tort, at common law, for the flowing of plaintiff's lands by water set back upon them by defendants' dam, but not sufficient to constitute a cause of action under the mill-dam law, is *held* on demurrer to have been intended to plead the former cause of action, although many of the facts stated are not material thereto and some of them seem to evince a purpose to state a cause of action under the mill-dam law.
2. The use of the word "wrongful" was not necessary to a statement of the cause of action in tort.

APPEAL from the Circuit Court for *Rock* County.

The appeal is from an order overruling a demurrer to the complaint. The case is sufficiently stated in the opinion.

H. P. Richardson, for the appellants.

For the respondent the cause was submitted on the brief of *Nolan & Cunningham.*

NEWMAN, J. The complaint, very clearly, states facts which constitute a cause of action in tort for the flowing of plaintiff's premises by water set back upon them by defendants' dam. It states sufficient to entitle the plaintiff to recover her damages for such flowing by the common law. The pleader has not contented himself with a "concise" statement of the facts constituting his cause of action, but has stated many other facts not material to his cause of action. Some of the facts stated seem to evince a purpose to state a cause of action for a recovery under the mill-dam law, but are not sufficient for that purpose. This complaint, as a whole, is challenged by a demurrer, on the ground that, on its face, it does not state facts sufficient to

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constitute a cause of action. Now, it manifestly does state facts sufficient to constitute a cause of action. It states a cause of action in tort, for flowing the plaintiff's lands. That could be made no clearer by the use of the word "wrongful." It is equally clear that it does not state a cause of action under the mill-dam law. No one claims that it does.

However it may be in doubtful cases, in a case like this it is fair and reasonable to hold that the pleader has intended to plead the cause of action which he has sufficiently pleaded, and to treat matters pleaded which are not relevant to that cause of action, and do not amount to the statement of another or different cause of action, as surplusage. If the party is aggrieved by it, he has a remedy by motion to strike it from the pleading as surplusage.

By the Court.— The order of the circuit court is affirmed.

NEWMAN, J. The case of *O'Rourke*, Respondent, *vs. Richardson* and another, imp., Appellants, presents the same question and is ruled by the decision in *Irwin v. Richardson, ante*, p. 429.

By the Court.— The order of the circuit court is affirmed.

NEWMAN, J. The case of *Walsh*, Respondent, *vs. Richardson* and another, imp., Appellants, presents the same question and is ruled by the decision in *Irwin vs. Richardson, ante*, p. 429.

By the Court.— The order of the circuit court is affirmed.

VAN LOAN, Appellant, vs. THE VILLAGE OF LAKE MILLS, Respondent.

October 3 — October 23, 1894.

Injury from defective sidewalk: Notice to village.

A notice that plaintiff was injured "while walking home on the sidewalk on Madison street, opposite the Moravian church, owing to a defective sidewalk," is not sufficient under sec. 1339, R. S., since it wholly fails to describe the alleged defect.

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APPEAL from the Circuit Court for *Jefferson* County. The facts are stated in the opinion.

For the appellant there was a brief by *Bushnell, Rogers & Hall*, and oral argument by *F. W. Hall.* They cited *Plum v. Fond du Lac*, 51 Wis. 397; *Weber v. Greenfield*, 74 id. 238; *Fopper v. Wheatland*, 59 id. 629; *Spellman v. Chicopee*, 131 Mass. 443; Laws of 1893, ch. 85.

W. H. Rogers, for the respondent, cited *White v. Stowe*, 54 Vt. 510; *Noonan v. Lawrence*, 130 Mass. 161; *Madden v. Springfield*, 131 id. 441; *Larkin v. Boston*, 128 id. 521; *Butts v. Stowe*, 53 Vt. 600; *Cronin v. Boston*, 135 Mass. 110.

ORTON, C. J. This is an action to recover damages for injury to the plaintiff, caused by the insufficiency and want of repair of a certain sidewalk in the defendant village. The statute (sec. 1339, R. S.) provides as follows: "No such action shall be maintained against any . . . village, unless within ninety days after the happening of the event causing such damage, notice in writing signed by the party, his agent or attorney, shall be given to . . . one of the trustees of the village . . . against which damages are claimed, stating *the place where* such damage occurred, and *describing generally the insufficiency or want of repair which* occasioned it," etc. The notice offered in evidence to answer the requirements of this section was as follows:

"LAKE MILLS, July 8, 1891.

"*To the Village Board of the Village of Lake Mills, Jefferson County, State of Wisconsin:* Take notice, on the 16th day of May, 1891, at 6 o'clock P. M., while walking home on the sidewalk on Madison street, opposite the Moravian church, in company with Prof. Terry, owing to a defective sidewalk, which caused me to fall and strike on my right knee, and seriously injure it, so that I am unable to walk as yet without great lameness and pain, and have

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been confined at home since the 16th day of May. Feeling that I am entitled to damages, the village can settle with me on easy terms, if disposed to do so. If the village board will pay me one thousand dollars damages, I will relinquish all claims against said village for damages, without further trouble. MINNIE VAN LOAN."

The plaintiff not having offered any other notice required by said statute, the court granted a nonsuit of the case, on the ground of defective notice. The learned counsel of the appellant contends that this notice was substantially sufficient to maintain the action, and this is the only question in the case on this appeal.

This is a very plain statute, and easily followed. It will not do to say that a notice under this statute that does not state the place where the damage occurred and describe generally the insufficiency or want of repair which occasioned it, is sufficient. This would be a bold violation of the statute, or destroy the very purpose and object of it. "Owing to a defective sidewalk on Madison street, opposite the Moravian church," might possibly answer for "the place where the damage occurred," if the defect itself was described so that the place could be found from the defect. But there is no attempt to describe the defect. What was it? The question is not answered. This notice is a condition precedent to maintaining the suit, and it must have reasonable certainty to be of any use whatever. *Wall v. Highland*, 72 Wis. 435; *Weber v. Greenfield*, 74 Wis. 234. This notice is a blank, so far as any description of the defect is concerned; and that is the very thing the village authorities wished and had the right to be informed of, so that they might repair it. The learned counsel of the appellant cite no case of such a defective notice being sustained by the court, and I am quite sure no such case can be found. The case is too plain for argument. The circuit court committed no error in granting the nonsuit

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for want of proof of a sufficient notice required by the statute.

By the Court.— The judgment of the circuit court is affirmed.

COOPER, Appellant, vs. THE VILLAGE OF WATERLOO, Respondent.

October 4 — October 23, 1894.

Municipal corporations: Injuries from defective sidewalk: Liability of lot owner: Joinder of parties: Appealable order.

1. A lot owner is not liable for injuries resulting from mere defects in the sidewalk in front of his lot, unless made so liable by statute.
2. A village charter providing that in certain cases the trustees should require lot owners to build or repair sidewalks, and if the latter failed to do so should have power to cause the work to be done at the expense of the lots, and ordinances passed in pursuance thereof, did not render a lot owner liable for an injury caused by a defect in the sidewalk which he was by such ordinances required to repair.
3. Sec. 1, ch. 471, Laws of 1889 (sec. 1339*b*, S. & B. Ann. Stats.),— providing that the person by whose wrong, default, or negligence a defect in the highway is caused shall be primarily liable for injuries happening by reason of such defect,— was not intended to create any liability or give any new right of action, but merely to regulate the remedy for rights of action otherwise created.

[4. Whether, under ch. 471, Laws of 1889, where a lot owner or other person is primarily liable for an injury resulting from a defect in the highway, the plaintiff can be compelled to make him a defendant in an action for such injury against the municipality, not determined.]

5. An order striking a cause from the calendar because of plaintiff's failure to bring in as a defendant a third person whom the defendant alleged to be primarily liable, is appealable.

APPEAL from the Circuit Court for *Jefferson* County.

This action is for personal injuries sustained by the plaintiff, January 19, 1893, and occasioned, as is alleged, by

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a depressed piece of sidewalk about thirty feet long on the south side of Madison street, in the defendant village, which was about fifteen inches lower than the sidewalk adjoining on the east and west; that this depressed piece was joined to the sidewalk running east by slanting planks about six feet long, laid lengthwise of the walk, forming an incline, the east end of which was about fifteen inches higher than the west end thereof; that upon the slanting planks there were nailed crosswise slats or cleats; that, by reason of such construction, snow and ice would accumulate thereon in such a manner as to render the said incline slippery and unsafe for travelers passing upon it. The defendant answered, to the effect that it was not personally liable for the damage claimed; that the adjoining lot owner, Mark Lever, was primarily liable therefor, if any one; and demanded that he be joined as defendant, pursuant to the statute.

The plaintiff having failed to amend her summons and complaint as demanded, and the cause having been duly noticed for trial on the calendar for that purpose, the defendant moved, upon said answer duly verified and an affidavit setting forth the ordinances of the village, to strike said cause from the calendar for such failure to make Mark Lever a party defendant. From an order granting such motion, the plaintiff appeals.

For the appellant there were briefs by *Bushnell, Rogers & Hall*, and oral argument by *F. W. Hall* and *W. H. Rogers*. To the point that sec. 1339*b* was intended to embrace only that class of cases in which the owner of the lot or third party was a wrong-doer, and in which he was liable before the passage of the act, they cited *Rochester v. Campbell*, 123 N. Y. 405; *Norton v. St. Louis*, 97 Mo. 537; *St. Louis v. Conn. Mut. L. Ins. Co.* 107 id. 92.

Geo. W. Bird and *H. T. Ames*, for the respondent, to the point that secs. 1339*b* and 1339*c* make the adjoining lot

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owner, in a city whose charter imposes on him the duty to construct and repair streets and sidewalks in front of his lot, primarily liable for all damages resulting from any defect therein for which the city would be liable under sec. 1339, cited *Woodward v. Boscobel*, 84 Wis. 226; *Kollock v. Madison*, id. 458; *Hiner v. Fond du Lac*, 71 id. 74; *Carthage v. Frederick*, 122 N. Y. 268; *In re Goddard*, 16 Pick. 504.

CASSODAY, J. The village charter provided, in effect, that "whenever a majority of all the owners of real estate lots bordering on one side of any such street or part of street, shall desire to have a sidewalk built or repaired," application thereof in writing shall be made by them to the board of village trustees, who thereupon "shall make an order specifying the manner the work shall be done, and require the owners of lots fronting on said street to make the improvements asked for, within such time as they shall deem proper; and if the owners of said lots do not make or cause to be made the said improvements within the time and manner so specified, the trustees shall have power to cause such work to be done, and levy a tax on the lots in front of which said work is done, and to collect the same as other taxes are collected, to pay therefor." P. & L. Laws of 1867, ch. 114, secs. 29, 30. One of the ordinances mentioned in the foregoing statement was passed October 31, 1871, and required such lot owners, including the owner of the premises in question, to build a good and substantial sidewalk in front of their respective lots on the south side of the street in question, as therein directed. The other ordinance mentioned was passed June 30, 1880, and required the owners of such lots, including the lot in question, to rebuild and repair the sidewalk in front of the same, as therein directed, within thirty days from the service or publication thereof, and in effect provided that, if

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such owners failed to complete such repairs within the time mentioned, then it would be the duty of the board to cause the same to be done at the cost of such property.

These provisions of the charter and of the ordinances mentioned did not, in our judgment, make the lot owners primarily liable, nor liable at all, for an injury to a traveler by reason of a defective sidewalk in front of their lots, respectively. On the contrary, they merely gave to the several lot owners the option of constructing or repairing the walk in front of their lots, respectively, or paying for the cost thereof, or of allowing the same to be enforced against and collected out of the lot as a special tax. Although the charter is somewhat different from the one involved in *Woodward v. Boscobel*, 84 Wis. 231, yet the principle of law involved is substantially the same as in that case, where it was held that the charter "leaves not only the primary, but the entire, obligation upon the city to build the walks and keep them in repair."

It is to be remembered that at common law a town or village or an adjoining land-owner was not liable for damages sustained by reason of a mere defective highway therein — much less by reason of a mere defective sidewalk therein. There is no liability, therefore, except such as has been created by statute. The statute makes "any town, city, or village" liable to any person sustaining damage "by reason of the insufficiency or want of repairs of any bridge, sluiceway, or road" therein. S. & B. Ann. Stats. sec. 1339. The statute also provides, in effect, that whenever any injury shall happen to any person or property in any city or municipal corporation or town by reason of any defect in any highway, street, alley, or public ground, or for any other cause for which such city or municipal corporation or town would be liable, and such defect, incumbrance, or other cause of such injury shall be caused by, arise from, or be produced by, the wrong, default, or

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negligence of any person, such person so guilty of such wrong, default, or negligence shall be primarily liable for all damages arising from such injury. Sec. 1339*b* (Laws of 1889, ch. 471, sec. 1). This section does not undertake to create a liability against the adjoining lot owner, but merely to authorize an action against both the town, city, or village and the person whose wrong, default, or negligence caused the defect, incumbrance, or other cause of such injury. Whenever, therefore, as in the case at bar, the defect complained of was not caused nor produced by nor arose from the wrong, default, or negligence of the adjoining lot owner, then it does not undertake to make him primarily liable, nor authorize a joint action against him and the village. It may be that the section is sufficiently comprehensive to include an incumbrance or other cause of injury of such a nature as to be a nuisance and hence to create a liability against the author of the same and in favor of the injured party at common law, as well as a mere defect for which some other statute has given to the injured party a right of action against the adjoining lot owner. However this may be, we are convinced that it gives no new right of action, but merely regulates the remedy for rights of action otherwise created.

The view we have taken of the statute makes it unnecessary to determine whether, in a case where such primary liability exists against such lot owner or other person, the court can force the plaintiff to make him a defendant, or allow him to take his chances of being defeated on the trial for want of necessary parties.

It follows from what has been said that the cause was properly on the calendar, and the plaintiff had the right to have it tried. The order striking it from the calendar affected a substantial right of the plaintiff, and in effect determined the action and prevented a judgment from which an appeal might have been taken, and is therefore appeal-

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able. Sec. 3069, R. S. To hold that such order is not appealable would be in effect holding that the court may for all time prevent the plaintiff from enforcing a trial. It is unlike an order refusing to strike a cause from the calendar, or striking it from the calendar for want of notice or a sufficient notice. *McLeod v. Bertschy*, 30 Wis. 324; *Noble v. Strachan*, 32 Wis. 314; *Lee v. Buckheit*, 49 Wis. 54; *Delaney v. Schuette*, 49 Wis. 366.

By the Court.— The order of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

BLEILER, Appellant, vs. MOORE and another, Respondents.

October 4 — October 23, 1894.

(1) *Fraudulent conveyances: Relationship of the parties.* (2, 3) *Appeal: Exceptions.* (4) *Replevin: Judgment.*

1. Relationship of the parties to a transfer of property alleged to be fraudulent as to creditors is not a badge of fraud, but is simply a circumstance which, when shown, calls for closer scrutiny and clearer explanation of the transaction.
2. An exception to the whole of a sentence in an instruction to the jury is *held* sufficient, although a part of the sentence would have been correct if standing alone, where such part depended upon, and was manifestly intended to be considered in direct connection with, the other part, which was erroneous.
3. A bill of exceptions, properly certified, is conclusive upon this court that an exception contained therein was duly taken.
4. Where property replevied from a sheriff exceeds in value the amount of the execution under which it was taken, and the plaintiff is the owner of the property except as against the execution creditor, the alternative judgment for the defendant, in case a return of the property cannot be had, should be for the amount of his special interest only.

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APPEAL from the Circuit Court for *Green* County.

Replevin for a quantity of personal property, consisting of cheese, live stock, grain, and hay. The plaintiff made the necessary affidavit and undertaking, and obtained immediate delivery. Plaintiff was the father of one William J. Bleiler, and claimed title to the property by conveyance thereof from his said son. The defendants were the sheriff and undersheriff, respectively, of Green county, and had seized and held the property upon executions against said William J. Bleiler; and, by answer, they justified such seizure under such executions, on the ground that the transfers thereof to the plaintiff were fraudulent and void as to creditors, and they demanded the return of the property, with damages, or its value in case return could not be had.

The action was tried before a jury, and much testimony introduced. Among other instructions to the jury the circuit judge gave the following instruction: "The relationship of the parties as father and son is regarded in law as a badge of fraud, and you are to carefully examine the dealings between the plaintiff and his son William for the purpose of ascertaining whether their dealings are upright, honest, and fair, or such dealings are fraudulent and for the purpose of hindering, delaying, or defrauding the creditors of the son." Exception was taken to this instruction by the plaintiff.

The jury returned a verdict to the effect that the plaintiff was not the owner of the property in question, but that it was owned by William J. Bleiler, and that it was not wrongfully taken or detained by defendants, and that defendants were entitled to return thereof, with five cents damages for the unlawful taking, and that the value of the property was $1,800. The plaintiff moved for a new trial on the ground that the verdict was contrary to the law and contrary to the evidence, which was overruled, and excep-

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tion taken. Judgment was entered for the defendants for the recovery of the property, or the sum of $1,800 in case delivery could not be had, with damages and costs, and plaintiff appeals.

J. M. Becker, for the appellant, argued, among other things, that where property is replevied from a sheriff holding it under an execution and having no other interest in it than that of the creditor whom he represents, if the defendant recovers and the value of the property is greater than the amount of the execution, the amount of his recovery is limited to the amount of the execution, with interest and costs thereon. *Gage v. Allen*, 84 Wis. 323; *Booth v. Ableman*, 20 id. 26; *Battis v. Hamlin*, 22 id. 669; *Warner v. Hunt*, 30 id. 200; *Burke v. Birchard*, 47 id. 35; *Smith v. Phillips*, id. 202; *Gaynor v. Blewitt*, 69 id. 582.

Jno. Luchsinger and *J. D. Dunwiddie*, for the respondents, cited Wells, Replevin, § 753; *Whitney v. Hyde*, 91 Mich. 13; *Alderman v. Manchester*, 49 id. 48; *Dawson v. Wetherbee*, 2 Allen, 461; *Johnson v. Neale*, 6 id. 229; *Quincey v. Hall*, 1 Pick. 357; *Whitwell v. Wells*, 24 id. 32; *Kimball v. Thompson*, 4 Cush. 441.

WINSLOW, J. Relationship of the parties to a transaction is not considered in the law as a badge of fraud, and the instruction to that effect was clearly erroneous. Bump, Fraud. Conv. (3d ed.), 56, and cases cited. Relationship is simply a circumstance proper to be shown, and which, when shown, calls for closer scrutiny and clearer explanation of the transaction. The exception taken to this instruction seems to us entirely sufficient. It is true it is taken to the whole sentence, but the sentence is entire, the latter part depending upon, and manifestly intended to be considered in direct connection with, the first part. It is said that the exception was not taken until after the term at which the

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case was tried. The exception is contained in the bill of exceptions, properly certified, and this is conclusive upon this court.

For another reason this judgment must be reversed. The proof showed that the plaintiff was the owner of the property in question as against all the world except a creditor of the son who should in a proper proceeding establish the fraudulent character of the transfer by the son. The interest of the defendants in the property was simply a special interest, limited to the amount of the execution levies, which the proof showed to be considerably less in amount than the value of the property. Over and above this special interest, the general ownership of the property was in the plaintiff, even if the transfers to him were fraudulent as to creditors. In this case the defendants have obtained an alternative judgment for the value of the entire property, although their special interest is not much more than one third of the value. Upon a new trial the amount of the defendants' special interest should be ascertained, and only for that amount should they have judgment in the event that judgment is rendered in their favor. *Booth v. Ableman*, 20 Wis. 21; *Farwell v. Warren*, 76 Wis. 527.

We are asked by the appellant to reverse the judgment on the ground that the evidence does not sustain the verdict; but we have examined the evidence, and cannot do so.

By the Court.—Judgment reversed, and action remanded for a new trial.

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LUEBKE, Administrator, Respondent, vs. BERLIN MACHINE WORKS, Appellant.

October 4 — October 23, 1894.

Master and servant: Injury to minor servant: Knowledge of danger: Assumption of risk: Court and jury: Instructions.

1. It is a question of fact for the jury whether a minor servant was of sufficient age, intelligence, discretion, and judgment to bring him within the operation of the rule applicable to adults, by which knowledge of open and obvious defects and dangers is imputed to them, and they are held to assume the risk incident thereto if they continue in the employment.
2. The question in such a case, however, is not what the minor servant *in fact* knew or comprehended as to the danger to which he was exposing himself, but what he ought to have known and understood, in view of his age, intelligence, discretion, and judgment; and, upon request, the jury should be so instructed.

APPEAL from the Circuit Court for *Rock* County.

This action was brought by the plaintiff, as administrator of his deceased minor son, John Luebke, to recover damages sustained by the plaintiff by reason of the death of the said John Luebke, caused, as it is alleged, by the negligence of the defendant when he was in its employ; and the plaintiff obtained a verdict and judgment, from which the defendant appealed.

The defendant owned and operated a foundry and machine shop situated on and partly over a mill race along Rock river, at Beloit. From a platform of the building a foot bridge extended across the race to the east side of it, and it was used by those who had charge of the power to go to and from the shop and foundry to the power house on the east side of the race. The bridge consisted of three lengths of planks, supported by piles driven in the race and cross pieces 2x4 or 2x6 spiked to the piles; and at the east end and in the middle it was two planks in width, but

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at the west end next to the shop and foundry there was but one plank, about ten inches wide, fastened at the west end about ten inches below the platform. The planks were two inches thick, and at the east end rested on the bank of the race about one foot above the general level, and there was no railing along the bridge. The core room of the foundry, in which the plaintiff's intestate, with other boys employed by the defendant, worked under a foreman, making cores for castings, was about 160 feet south or below the bridge, and they required and used considerable flour in making them, which they obtained at a flour mill on the opposite or east side of the race, about 100 feet above the east end of the bridge. There was was a wagon bridge a short distance below and south of the core room, which was wide and safe, available to and sometimes used by the boys for getting flour from the mill. The evidence tends to show that they were never directed to go any particular way to get flour or use the foot bridge, but went either way as they chose; that the defendant knew of and permitted the use of the foot bridge by the boys for that purpose; and that the wheelbarrow they used was an old rickety one, and not a safe appliance for the purpose of bringing flour over the foot bridge. When the boys used the foot bridge to get flour, they passed from the core room into the foundry, thence into the machine shop, and thence to the door opposite the foot bridge, and out upon a platform upon and over the foot bridge to the flour mill. When they went over the wagon bridge below, they passed from the core room into the foundry, thence into the room next the core room in the front of the foundry, opening upon the street, and thence across the wagon or highway bridge over the race and along the highway up to the mill. In returning with a load of flour, they ran the wheelbarrow up a single plank upon the foot bridge; but at the west end of it, next the shop, where there was but a single plank,

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some one was required to lift the barrow up on the platform. It was claimed on the part of the plaintiff, and there was evidence tending to support it, that the bridge was not a reasonably safe passageway for use by the boys in bringing flour from the mill to the foundry, more particularly by reason of the manner of its construction and narrowness and want of railing, and that the wheelbarrow was not a safe vehicle for bringing flour, but was old and rickety, and its use for that purpose was unsafe.

The plaintiff's intestate, about the 15th of September, 1892, of the age of nearly sixteen years, had been in defendant's employ for several months from time to time, and then was, and had been since the previous June, at work in the core room, and it was his duty to make cores, attend to the fires, and go after flour, etc. On the day in question he went over to the mill with the wheelbarrow to get flour. It does not appear that he had been specially directed to do so, and no one seems to have seen him until he reached the mill and asked for flour. The miller put a bag of flour on the barrow, and asked him "which way he was going with the flour; if he was going over by the wagon bridge or the foot bridge. He answered he would go by the foot bridge, and I advised him, I told him it was better he would go around by the wagon bridge. He said if he would dump the flour in he would come back and get another sack; that is all that was said. He went on, and I went into the mill." It does not appear that he was afterwards seen alive. The alarm was given that some one was in the race, and he was taken out dead on the east side thereof. The barrow was nearer the east side than the west side of the race, and the evidence tended to show that he must have fallen in about the middle of the foot bridge.

The plaintiff claimed that the bridge across which the boys were required, or accustomed with the knowledge of the defendant, to bring flour in the wheelbarrow, was

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dangerous and unsafe by reason of improper and negligent construction, and was an unsafe place for passage by one so young as the deceased; and that the wheelbarrow with which he was furnished was an unsafe and insufficient appliance, as the defendant well knew; and that the defendant negligently omitted to inform or caution the deceased in respect to the use of said bridge and barrow, as it should have done; and that by reason of the premises, and on account of the defendant's said negligence, the said John Luebke tripped, lost his footing and balance, and fell and was thrown into the race, and lost his life by drowning. He left, surviving him, his father, the plaintiff, and his mother, each aged about fifty-five years and dependent in part on his services.

The more material allegations of the complaint were denied by the defendant, and it was claimed, among other things, that the said John Luebke was guilty of contributory negligence in using said bridge and wheelbarrow; that he was of sufficient age, intelligence, and discretion to comprehend the dangers in question to which he was exposed, and that he had knowledge of the same and assumed the risk thereof; that the defects in the foot bridge and wheelbarrow were open and apparent defects.

There was evidence tending to support the various contentions of the parties, and the court, on the part of the defendant, was asked to instruct the jury, among other things, in substance, that "in determining whether the boy was of sufficient age, understanding, and experience to comprehend the dangers to which the use of the bridge for carrying flour as he carried it on his last trip exposed him, you are to consider his age and opportunities which he had to observe the apparent danger of wheeling a barrel of flour across the mill race upon the foot bridge, and to determine from all the facts and circumstances surrounding his death whether or not he was of such an age and under-

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standing that, even though he may not have fully apprehended it, yet that the danger was so open and apparent, if you find it to be so, that a boy of his age, experience, and understanding ought to have known it and ought not to have exposed himself to it." But the court refused to so charge. Other like instructions on this point were asked and refused. The court instructed the jury on the question of contributory negligence and on the question of assumed risk, to portions of which exceptions were taken, in substance, that "a servant must exercise ordinary care for his personal safety in any employment. He must make a reasonable use of his senses to avoid injury to himself in the course of his employment; and if he fails to do so, and in consequence of such failure he is injured, he cannot recover damages of his master. An employer is not liable for an injury sustained by an employee where his own negligence or want of ordinary care contributes materially to the injury. . . . A servant, on entering a service, accepts and assumes the ordinary hazards and dangers of his occupation,—such as are incident to it; and for an injury sustained through such danger he cannot recover. It is the duty of the employee, without warning, to observe due care, and any omission to do this is at his own peril. . . . If an employee, from youth, inexperience, ignorance, or want of general capacity, may fail to appreciate the danger of an employment, it is a breach of duty on the part of the master to expose such a servant, even with his own consent, to such dangers, unless he first gives him such instructions or cautions as will enable him to comprehend them and do his duty. . . . *The question on this branch of the case is not of due care on the part of the plaintiff, but whether the cause of the injury was one of which he knowingly assumed the risk*, or one of which, by reason of his youth and consequent incapacity to understand and appreciate its dangerous character, or the neglect of the defend-

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ant to take due precautions to effectually inform him thereof, the defendant is bound to indemnify him for the consequences."

The jury found a general verdict for the plaintiff, assessing his damages at $1,800, and also a special verdict finding, among other things, that the officers and agents of the defendant knew that the foot bridge was insufficient and dangerous for use, but did not inform the boy of such danger; that before attempting to cross the foot bridge at the time in question he was warned or cautioned by Mr. Haase, the miller, to go around another way; that he was *not aware* of the fact that it was dangerous to attempt to cross the bridge with a wheelbarrow loaded with flour, prior to his said attempt; that he did not *knowingly* take upon himself the risk of accident in crossing the foot bridge at the time in question; that the wheelbarrow was not in a reasonably safe condition for the use to which it was put; that the boy was in the exercise of ordinary care at the time he fell from the foot bridge and was drowned; and that he *was not fully aware* of the danger he was subjecting himself to in crossing the race on the bridge with a wheelbarrow loaded with flour. A motion for a new trial, on the ground, among others, that the verdict was contrary to law and contrary to the evidence, was denied.

For the appellant there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *E. P. Vilas.*

For the respondent there was a brief by *Winans & Hyzer*, and the cause was argued orally by *E. M. Hyzer.*

PINNEY, J. The evidence tends very strongly to show that the dangers to which the plaintiff's intestate was exposed in his service and in crossing the foot bridge with the wheelbarrow loaded with flour, whether arising from the defective and dangerous construction of the bridge or the

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use of the worn out and rickety wheelbarrow, were open and obvious, and that he must have been familiar with the situation for a period of about three months, during which he was engaged in the core room, and immediately prior to the accident. Had he been an adult, it is difficult to see upon what ground it could be said that he had not, as a matter of law, by continuing so long in the service of the defendant, assumed the risk of injury from those causes, so that the case ought not to have been submitted to the jury. It is well settled that if the alleged defect or element of danger is such that, in the exercise of ordinary care, the servant ought to have observed it and comprehended the danger likely to result, then he assumed the risk if he continued in the employment. *Haley v. Jump River L. Co.* 81 Wis. 412, 421, 425; *Dorsey v. Phillips & C. Const. Co.* 42 Wis. 583; *Ballou v. C. & N. W. R. Co.* 54 Wis. 257; *Goltz v. M., L. S. & W. R. Co.* 76 Wis. 136. The servant must take ordinary care to observe and ascertain whether any or what dangers are incident to his service. If the defect or danger is open and obvious, knowledge of it on his part will be presumed or imputed to him as a matter of law; and an adult servant is presumed to possess ordinary intelligence, judgment, and discretion to appreciate such danger, so as to regulate his conduct and avoid it. Knowledge of the danger, and consent to continue in the service notwithstanding, is in such case imputed to the servant; so that if he subsequently suffers injury in consequence thereof he has no right of recovery against the master. This view is in accordance with what was held in *Jones v. Florence M. Co.* 66 Wis. 268, 277. The same rule applies to the case of an employee who is a minor, where the defect or danger is open and obvious, in so far as he is of such age, intelligence, discretion, and judgment as to enable him to comprehend the situation and appreciate the danger incident to the work or employ-

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ment. Subject to this qualification, knowledge of the defect or danger is to be imputed to him in like manner as to an adult. It is, however, a question for the jury to determine upon the evidence whether a minor servant was of sufficient age, intelligence, discretion, and judgment to bring him within the operation of the rule applicable to adult servants. *Chopin v. Badger P. Co.* 83 Wis. 192. In the absence of proof, it is fair to presume that he possessed these characteristics in the degree usual to persons of his age. Because the question was one for the jury, the defendant's motion for a nonsuit and the request that the jury be directed to find for the defendant were properly denied.

The instruction asked by the defendant, and refused, should, we think, have been given. The consequence of its refusal was that the defendant was denied the benefit of the rule as to imputed negligence and assumed risk, to the extent it was properly applicable to the case, and the case was made to turn, so far as open and obvious defects and danger were properly an element in the case, not upon what the plaintiff's intestate ought to have known and understood, in view of his age, intelligence, discretion, and judgment, but upon what he *in fact* knew or comprehended as to the danger to which he was exposing himself. He was bound to exercise the degree of intelligence, knowledge, and judgment he actually possessed, as much so as an adult, and must be held to have assumed the risk if he exposed himself to a danger which was open and obvious and which he was capable of perceiving and fully appreciating, whether he actually appreciated and comprehended it or not. The general charge does not contain any instruction equivalent to the one asked, and entirely excluded from the consideration of the jury the material question whether the plaintiff, in view of his age, intelligence, discretion, and judgment, ought reasonably to have known

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and understood the dangers to which he was exposed in his employment. The effect of this error is indicated by the answers of the jury to questions submitted to them, as above stated.

Other errors were assigned, but, as the questions thus presented may not arise on a new trial, it is not necessary to consider them. For the reasons stated, the judgment of the circuit court must be reversed.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

EDWARDS and others, Respondents, vs. THE AGRICULTURAL INSURANCE COMPANY OF WATERTOWN, NEW YORK, Garnishee, Appellant.

October 4 — October 23, 1894.

Insurance against fire: Interpretation of policy: Mistake: Garnishment.

One A. worked by the day in the erection of a house, and S. & M. furnished lumber therefor. Both wishing insurance, A. took out a policy in his own name for an amount sufficient to cover the claims of both. He intended it to cover both claims, and S. & M. paid one half of the premium. When it was discovered that it did not cover the claim of the latter, there was indorsed on the policy, with A.'s consent: "Loss, if any, under this policy, payable to S. & M. as their interest may appear." The building was afterwards destroyed by fire. In garnishment proceedings against the insurance company by creditors of A., it is *held* that the policy insured only the interest of A., and that the amount of his loss was payable to S. & M. to the extent of their interest.

APPEAL from the Circuit Court for *Rock* County.

The principal defendant, John Arquette, did work and labor, and rendered other services, in and about the erection of a dwelling house for one Mary Mulhall, at day

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wages. *Schaller & McKey* furnished lumber to Mrs. Mulhall for the building. There became due to Arquette, for wages, $347.70. There became due to *Schaller & McKey*, for lumber, $350.77. Both parties wished insurance on the building to secure their claims. For this purpose Arquette procured a policy in his own name for $700, which was enough to cover both claims. He intended it to include both claims. When it was discovered that it did not cover the claim of *Schaller & McKey*, with the consent of Arquette there was indorsed upon the policy this direction: "Loss, if any, under this policy, payable to *Schaller & McKey* as their interest may appear." In this form the policy was issued to Arquette. *Schaller & McKey* paid one half of the premium. The building was afterwards destroyed by fire. All proceedings necessary to fix the liability of the company were taken. Then the several plaintiffs began their several separate actions against Arquette, and garnished the insurance company.

The action was tried before the court without a jury. The court, in effect, found that the insurance company was liable on the policy of insurance to Arquette for $347.70, and to *Schaller & McKey* for $350.77, and gave judgment for *Schaller & McKey* for $350.77, and for the several plaintiffs to the aggregate of $347.70, against the insurance company, as garnishee of Arquette. From this judgment the insurance company appeals.

For the appellant there was a brief by *Dunwiddie, Goldin & Wheeler*, and oral argument by *B. F. Dunwiddie.*

For the respondents there was a brief by *Sutherland & Nolan*, attorneys for *Edwards*, and *John Cunningham*, attorney for *O'Brien* and *Downing*, and a separate brief by *M. P. Richardson*, attorney for *Schaller & McKey* (who were interpleaded as defendants by order of the court on their petition); and the cause was argued orally by *G. G. Sutherland*, *Mr. Cunningham*, and *Mr. Richardson.*

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NEWMAN, J. It was conceded on the argument that both Arquette and *Schaller & McKey* had insurable interests in the building of Mrs. Mulhall. This could scarcely be questioned, at least since the decision of *Horsch v. Dwelling House Ins. Co.* 77 Wis. 4.

It seems clear that the policy of insurance was not written in accordance with the wishes or intention of Arquette. But it was received by him with full knowledge of the form of its writing; and the indorsement making the loss, if any, payable to *Schaller & McKey* was made under his direction. The policy must be held to embody the agreement of the parties.

This is an action at law upon the contract itself. The court was not asked to reform it on the ground of mistake or otherwise. Perhaps it could not be reformed in this action, even if it were shown to be a proper case for reformation in a proper action for that purpose. So the recovery must be according to the terms of the contract itself. The contract, by its terms, insures only the interest of Arquette. The amount of his loss alone is recoverable upon it. By his appointment, made at the time of making the contract, this loss is payable to *Schaller & McKey* as their interest may appear. Their interest is larger than Arquette's loss. There is nothing coming to Arquette after satisfying *Schaller & McKey's* interest. There is nothing due to him from the garnishee,— nothing to be garnished. *Schaller & McKey* should recover from the insurance company the amount of Arquette's loss. Judgment should be for the insurance company in all the garnishment actions.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded with direction to enter judgment in accordance with this opinion.

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ISELY, Respondent, vs. ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

October 5 — October 23, 1894.

Court and jury: Credibility of witnesses: Instructions.

1. Where much of the testimony in an action was in direct conflict, and plaintiff's own testimony conflicted with that given by him on former trials, it was error to charge the jury: "It is your duty to reconcile the testimony, if it is possible, on the theory that every witness has intended to testify truly in the case. The law does not presume, and will not presume, that any witness testified falsely. Therefore, if it is possible for you to reconcile the evidence on the theory that any witness is mistaken either in regard to time or any other fact important to be established in this case, it is your duty to do it. It is better to assume that the witness has made a mistake than to assume he has lied."
2. On the last trial plaintiff was asked, on cross-examination, whether he did or did not, on the former trials, swear as stated in the questions. To some of these questions he answered that he had testified as stated, but that his testimony was untrue. To many of the questions, however, he answered that he could not remember. *Held*, that it was error to charge the jury that "when a witness is asked if he did not testify so and so before, he will generally say that he don't remember,—and I think it is almost impossible for witnesses to remember what they have testified to; but they may say: 'I don't know. I tried to testify according to the fact then, and I am trying to do it now.' A witness can remember the transaction better than he can remember what he testified about it before. . . . In the excitement of a trial, in the rapidity with which questions are put and are compelled to be answered, a witness will sometimes perhaps not half understand the question, and he will answer accordingly, so as to put himself in a false position," etc.

APPEAL from the Circuit Court for *Green* County.

This action was commenced in justice's court to recover the value of ten boxes of Limburger cheese, containing 1,120 pounds, claimed to have been delivered by the plaintiff to the defendant at its depot in Argyle, September 13,

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1892, for the purpose of having the same transported to Monroe, and consigned to Roth, Luchsinger & Co. at that place, and which cheese, it is alleged, was lost by the defendant and never delivered to the consignees. The defendant denied each and every allegation of the complaint.

The trial in the justice's court resulted in a judgment in favor of the plaintiff, from which the defendant appealed to the circuit court, wherein the cause was retried at the October term of said court for 1893, and upon that trial the jury disagreed. The cause was again tried at the March term of the circuit court for 1894, and at the close of this last trial the jury returned a verdict in favor of the plaintiff, and assessed his damages at $97.57. From the judgment entered accordingly the defendant appeals.

For the appellant there were briefs by *P. J. Clawson*, attorney, and *B. J. Stevens*, of counsel, and oral argument by *Mr. Clawson*.

John M. Becker, for the respondent, to the point that instructions allowing the jury to reconcile conflicting testimony upon the theory of witnesses being mistaken are proper, cited *Moore v. Kendall*, 2 Pin. 99; *Taylor v. Young*, 61 Wis. 314; *Rudolph v. Lane*, 57 Ind. 115; Sackett, Inst. to Juries, 32, 33.

Cassoday, J. The plaintiff claims that he delivered in all twenty boxes of cheese to the defendant at Argyle, consigned to Roth, Luchsinger & Co. at Monroe; that ten of the boxes were so delivered September 13, 1892, and the other ten September 14, 1892; but that Roth, Luchsinger & Co. only received the ten so shipped September 14, 1892. The defendant admits the receiving of twenty boxes of cheese from the plaintiff September 14, 1892, but claims that only ten of them were consigned to Roth, Luchsinger & Co., and that the other ten were consigned to Charles Roeder & Co., and absolutely denies receiving ten boxes

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September 13, 1892. The court properly charged the jury to the effect that if the plaintiff delivered ten boxes of cheese to the defendant at its depot in Argyle, September 13, 1892, then he was entitled to recover the value of the same, but if he did not then he was not entitled to recover. The question submitted, therefore, was purely one of fact for the jury.

The evidence on the part of the defendant is partly written; while that on the part of the plaintiff seems to rest wholly, or almost wholly, upon the memory of witnesses;—and memory is not always reliable in fixing a precise date. Much of the testimony in behalf of the respective parties was in direct conflict. This being so, very much depended upon the credibility of the witnesses. That was peculiarly a question for the jury. The plaintiff was sworn and examined as a witness in his own behalf on each of the three trials mentioned. His testimony on these three several trials appears to have been more or less conflicting. On his cross-examination upon the last trial, he was confronted with portions of his testimony on the former trials, and asked whether he did or did not swear as stated in the questions. To some of these questions he testified that he had previously testified as stated, but that such testimony was untrue; and to a very large number of the questions he answered to the effect that he did not recollect or could not remember. Under these circumstances, we think it was error for the trial court to charge the jury as follows: "It is your duty to reconcile the testimony, if it is possible, on the theory that every witness has intended to testify truly in the case. The law does not presume, and will not presume, that any witness testified falsely. Therefore, if it is possible for you to reconcile the evidence on the theory that any witness is mistaken either in regard to time or any other fact important to be established in this case, it is

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your duty to do it. It is better to assume that the witness has made a mistake than to assume he has lied."

Thompson on Trials states the correct rule, and says: "The judge must be careful not to trench upon the exclusive province of the jury in determining the credibility of particular witnesses, or the degree of credit to be given to particular elements of the evidence. . . . He should not undertake to control the freedom of their judgment in dealing with the probabilities of the testimony, by laying down artificial presumptions to control them in arriving at their verdict. Thus, he should not tell them that, in passing on the credibility of a witness, they should consider that it is a rule of law — a presumption — that men testify truly and not falsely." 2 Thomp. Trials, § 2420.

The court further charged the jury as follows: "Where a case has been tried one or more times before it is tried lastly in the circuit court, and a witness is asked if he did not testify so and so before, *he will generally say that he don't remember,— and I think it is almost impossible for witnesses to remember what they have testified to;* but they may say in this way: 'I don't know. I tried to testify according to the fact then, and I am trying to do it now.' A witness can remember the transaction better than he can remember what he testified about it before. That is the universal rule; and I think it is proper that I should call your attention to that. In the excitement of a trial, in the rapidity with which questions are put and are compelled to be answered, a witness will sometimes perhaps not half understand the question, and he will answer accordingly, so as to put himself in a false position. Then he is questioned, when the case comes to be tried again: 'Didn't you testify so and so?' He says he don't remember; *and it is impossible to remember*, although, as I said, if I were on the stand as a witness and was testifying, I should say," as above stated. This, as we think, was not

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only an invasion of the province of the jury, but, under the peculiar circumstances mentioned, an argument in favor of the credibility of the plaintiff's testimony. 2 Thomp. Trials, § 2420; *Lampe v. Kennedy*, 60 Wis. 110.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

SCHWIN and another, Respondents, vs. HELLRIEGEL, Appellant.

October 5 — October 23, 1894.

Appeal: Evidence held to support verdict.

In an action to recover one half of the amount for which a threshing machine belonging to plaintiffs and defendant was sold by the latter, the evidence is *held* to support a verdict adverse to the defendant's counterclaim for damages by reason of an injury to the machine caused, prior to the sale, by plaintiffs' negligence.

APPEAL from the Circuit Court for *Ozaukee* County.

The cause was submitted for the appellant on the brief of *D. M. Jackson*, and for the respondents on that of *E. S. Turner*.

WINSLOW, J. This action is for money had and received. The plaintiffs owned an undivided one-half of a threshing machine, and the defendant owned the remaining undivided half thereof. The defendant sold and delivered the entire machine to a third person for $55, and received the money. This action is brought to recover one half of this sum. The defendant admits the sale and receipt of the consideration, but counterclaims for $160 damages, because he claims that the plaintiffs had exclusive possession of the

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machine for several years before the sale by him, and negligently housed it, so that it became rotten and nearly worthless. It is very doubtful whether there was any testimony which substantiated the defendant's counterclaim, but, conceding that there was such testimony, there was also ample evidence to the contrary. No exception was taken to the charge of the court, and the jury returned a verdict for the plaintiffs, upon which judgment was rendered. Under these circumstances, this court cannot interfere with the judgment.

By the Court.— Judgment affirmed.

SILVERNAIL, Appellant, vs. RUST, Respondent.

October 5 — October 23, 1894.

(1, 2) *Appeal from justice's court: Delay in deciding: Jurisdiction: Review of facts.* (3) *Sale of chattels: Evidence.*

1. The failure of the circuit court to decide an appeal from justice's court at the term at which it is heard does not work a discontinuance or deprive the court of jurisdiction to decide it at a subsequent term, or even in vacation.
2. Sec. 3769, R. S., as amended by ch. 216, Laws of 1891 (providing that upon the hearing of an appeal from justice's court, "where there is no new trial in the appellate court, such court shall give judgment according to the weight of the evidence and the justice of the case . . . without regard to the findings of the justice"), applies to cases where the judgment in justice's court was given upon the finding of a jury as well as where it was given on a finding by the justice.
3. In an action to recover the purchase price of a belt, the evidence is *held* to support a finding that a conditional sale of a feed cutter, horse-power, and belt had failed, and that by a subsequent arrangement between the parties the sale really made was of the feed cutter only.

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APPEAL from the Circuit Court for *Waukesha* County.

This action originated in justice's court, plaintiff claiming that the defendant had purchased of him a quantity of belting, agreeing to pay therefor the sum of $5, which he had refused to pay, and to recover which he brought suit. The defendant denied the purchase of the belting, and alleged that at the time in question he bought from the plaintiff, upon trial, a feed cutter, horse-power, and belt, and that he was to pay the sum of $80 therefor provided it worked well; that it did not work properly, and the defendant settled for the said feed cutter, and paid the plaintiff the sum of $38 therefor, but refused to take the belt and horse-power.

There was a trial before a jury, which resulted in a verdict in favor of the plaintiff for $2.50 damages. The defendant appealed to the circuit court, where the judgment of the justice's court was reversed, with costs, the court finding that, "according to the weight of the evidence and the justice of the case, without regard to technical errors which do not affect the merits, and without regard to the finding of the justice's court, as provided by ch. 216, Laws of 1891, said judgment, both as to damages and costs, ought to be wholly reversed."

It appeared from the return that three trials of the action had been had in justice's court, the respective juries in the first two trials disagreeing. After the case had been heard in the circuit court upon the return of the justice (January 13, 1892), it was held under advisement until the 13th of June, 1893, four terms having intervened in the meantime, when the court rendered judgment as above stated, without notice to the plaintiff's attorney. A motion to set the judgment aside for want of such notice, and on the ground that the court had lost jurisdiction to render judgment by the expiration of the term at which the hearing took place before deciding it, was denied. A further

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statement of such facts as are material will be found in the opinion.

For the appellant there was a brief by *W. A. Pierce*, attorney, and *T. W. Haight*, of counsel, and oral argument by *Mr. Pierce.*

D. S. Tullar, for the respondent.

PINNEY, J. 1. The failure of the court to decide the case at the term at which it was heard did not work a discontinuance or deprive the court of jurisdiction to decide it at a subsequent term, or even in vacation. S. & B. Ann. Stats. sec. 2422*a*. Besides, the delay was the act of the court, and should not be allowed to operate to the prejudice of either party.

2. The act amending sec. 3769, R. S. [Laws of 1891, ch. 216], applicable to the hearing of appeals in the circuit court in cases such as this, providing that, "upon the hearing of the appeal where there is no new trial in the appellate court, such court shall give judgment according to the weight of the evidence and the justice of the case, without regard to technical errors which do not affect the merits, and without regard to the finding of the justice," etc., applies as well to cases where the judgment was given upon the finding of a jury in justice's court as upon a finding by the justice. The statute extends to all cases "where there is no new trial in the appellate court," and authorizes the circuit court to review the finding of a jury or justice if not according to the weight of evidence, and disregard it in giving judgment on the appeal. Whether the law providing for such a review upon the facts or the verdict of a jury, with the data afforded for this purpose by the scanty and fragmentary manner in which the testimony is usually returned, with a view to determine whether the finding in the court below is against the weight of evidence, and of giving judgment according to the opinion of the appellate

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court thereon, is a judicious enactment, is a question which may well admit of a considerable difference of opinion; but, as it is an enactment clearly within the power of the legislature, the question of policy involved is not open for consideration.

3. It appears that there was a sale by the plaintiff to the defendant of a feed cutter, belt, and horse-power, upon trial, for the sum of $85; but they did not work to defendant's satisfaction, and the result was that subsequently the defendant elected to retain the feed cutter only, at the price of $38, for which he gave his note. After about a year, the plaintiff came and took the horse-power, and the defendant offered him the belt as well; but he refused to take it, and subsequently brought this action to recover five dollars, claiming that to have been its price. Evidently, the circuit court was of the opinion that the conditional sale of the feed cutter, belt, and horse-power failed, and that by the subsequent arrangement the sale really made was of the feed cutter only; and we think the evidence supports that conclusion.

We are unable to say that any error is shown by the record, and the judgment of the circuit court must therefore be affirmed.

By the Court.— The judgment of the circuit court is affirmed.

VOELZ and wife, Respondents, vs. VOELZ and others, Appellants.

October 6 — October 23, 1894.

Partition: Homestead right of widow: Jurisdiction.

The homestead right of a widow is not subject to partition, and the circuit court has no jurisdiction in partition proceedings to order a sale of the land so as to divest her of such right. NEWMAN, J., dissents.

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APPEAL from the Circuit Court for *Waukesha* County. The facts are stated in the opinion.

C. A. Koeffler, Jr., for the appellants, to the point that the "homestead estate" cannot be partitioned, and the legislature never contemplated a partition thereof, cited sec. 21, ch. 72, R. S. 1849; ch. 137, Laws of 1858; secs. 3954, 3121, 3135, R. S.; *Keyes v. Hill*, 30 Vt. 767; *Hoffman v. Neuhaus*, 30 Tex. 636; *Doane v. Doane*, 33 Vt. 652; *Nicholas v. Purcell*, 21 Iowa, 265; *Dodds v. Dodds*, 26 id. 311.

For the respondents there was a brief by *Carney, Clasen & Walsh*, and oral argument by *E. D. Walsh*. To the point that the heirs of an estate have such an estate in possession as will enable them to maintain a bill in equity for a partition, they cited *Campau v. Campau*, 19 Mich. 116; *Streeter v. Paton*, 7 id. 341; *Marvin v. Schilling*, 12 id. 356; *Patterson v. Patterson*, 49 id. 176.

ORTON, C. J. This is a proceeding to partition certain real estate lying in the county of Waukesha in this state, among the heirs at law of William Voelz, deceased, and *Caroline Voelz*, the widow of the said William Voelz, deceased, who was in possession of a portion of said lands as her homestead. The situation of said real estate having been ascertained by the report of a referee, with the view of ascertaining whether the same should be divided between said parties, or sold and the proceeds thereof distributed among the same, judgment was entered for the sale of the same, on default of the defendants. By said judgment the homestead right of the said *Caroline Voelz* was also ordered to be sold, and "that the purchaser should have said lands discharged from all claim by virtue of such homestead and the dower right of said *Caroline Voelz*." Thereupon the said *Caroline Voelz* and *Louis Voelz* petitioned the court to stay all further proceedings in said partition

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suit until the court should determine whether it had any jurisdiction to enter said order, and, if it should determine that it had not, to dismiss said proceedings. The court denied said petition, and revoked the order to show cause based thereon, and dissolved the restraining order, with costs, and this appeal is from said order.

It may be observed that this judgment is not to sell the interest or title of the heirs in remainder or reversion after the homestead right of the widow, *Caroline Voelz*, in the real estate has expired, so that the question whether any such estate is subject to partition under the statute is not material. The judgment is that the land in which the said *Caroline* has a homestead right shall be sold, and the purchaser hold the same "discharged from all claim by virtue of such *homestead* and dower rights." On such sale, the widow, the said *Caroline*, is *divested* of all her homestead right in said lands or any part thereof. The learned counsel of the appellants contends that the court had no jurisdiction to subject to either partition or sale the homestead of the said widow, *Caroline Voelz*, or to divest her thereby of her title to the same. This contention is unquestionably correct.

1. The statute confers no such jurisdiction on the courts. Sec. 3101, R. S., provides as follows: "All persons holding lands as *joint tenants* or *tenants in common* may have partition thereof by civil action, in the manner provided in this chapter." There is nothing more self-evident than that the homestead of the widow is not held as a joint tenancy or tenancy in common. Her right, as well as possession, are exclusive of all others.

2. This is also shown by the nature of the homestead right. It consists of forty acres of agricultural land and the dwelling house thereon, *owned* and *occupied* by any resident of the state, and selected by him as such. R. S. sec. 2983. "The homestead means a place of residence, im-

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plying *occupancy* and *possession*." *Upman v. Second Ward Bank*, 15 Wis. 449. "When the owner of any homestead shall die, not having lawfully devised the same, such homestead shall descend," etc., "if he shall leave a widow and issue, to the widow during her widowhood, and upon her marriage or death to his heirs," etc. R. S. sec. 2271, subd. 2. It is a good answer to an action for partition that the widow holds the exclusive title for life or during widowhood. *Hannan v. Oxley*, 23 Wis. 519.

3. There is concurrent jurisdiction in the county court for the partition of estates to the heirs, and partition of the homestead of the widow is expressly excluded. Sec. 3954, R. S., provides "that when the term of a widow entitled to a homestead right, or dower, or other life estate in the lands of a deceased person, *shall expire*, the reversion may be assigned to the persons entitled to the same," etc. "An action for partition can only be maintained by one having the actual or constructive possession of the premises, or the right to the same." *Morse v. Stockman*, 65 Wis. 36.

Our laws have thrown around the homestead every necessary protection for the humane and beneficent use for which it was designed, and no such exception by which the widow could be divested of it is found in the statute. It would require positive legislation to subject the widow's homestead to the uncertain tenure of the capricious action of the heirs, whenever they might wish to have a partition or sale of the lands of the estate. There is not only no such provision, but, as we have seen, the statutes and the nature of the homestead right preclude any such interference with it. Where the widow's homestead is provided for in other states, it is held not to be subject to partition. *Keyes v. Hill*, 30 Vt. 767; *Doane v. Doane*, 33 Vt. 652; *Hoffman v. Neuhaus*, 30 Tex. 636; *Nicholas v. Purcell*, 21 Iowa, 265; *Dodds v. Dodds*, 26 Iowa, 311.

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It is useless to speculate as to what kind of an estate the widow's "homestead right," as it is called in the statute, is, or as to how it should be classified. It is sufficient that it is accompanied by actual and exclusive possession, that cannot be disturbed so long as she lives unmarried. The court, therefore, had no jurisdiction over it in this case.

By the Court.— The order of the circuit court is reversed, and the cause remanded with direction to set aside or modify the judgment in the main case in accordance with this opinion.

NEWMAN, J. It is believed that the decision of the court in this case is out of harmony with the whole current of its decisions on the subject of jurisdiction. The question to be adjudicated is whether the judgment and order of sale made by the circuit court, and which are assailed by this motion, were made in a case where the court was without jurisdiction to make them, and are void; or whether they were made in a case within the jurisdiction of the court, and, if irregular, are simply erroneous. If they are void, they can be vacated on this motion. If they are erroneous only, they cannot be vacated, or modified even, on this motion, but are valid until reversed upon appeal. The question turns upon the point whether they were made in a matter which was within the jurisdiction of the circuit court.

Jurisdiction is defined to be "the power to hear and determine causes." It is defined by the present chief justice of this court in *Monroe v. Ft. Howard*, 50 Wis. 228, to be "the power to pronounce judgment." It is nowhere defined to be "the power to pronounce the right judgment." It is broader than that. It includes also the power to pronounce a wrong judgment. Jurisdiction of the person is obtained by the service of process. Jurisdiction of the subject matter is power to adjudicate concerning the gen-

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eral question involved. FOLGER, J., in *Hunt v. Hunt*, 72 N. Y. 217–229. Jurisdiction is generally understood to be complete where the process has been properly served and the court has jurisdiction of the subject matter.

The plaintiffs brought an action for the partition of certain premises. The defendant *Caroline Voelz*, their mother, the widow of their deceased father, had an estate of homestead in a part of such premises. The complaint showed her interest, and asked that it be included in the judgment for partition and order of sale. She was made a party defendant, and the summons was served upon her. She made no defense. The jurisdictional question involved here is this: Had the circuit court power to determine whether or not that homestead estate was subject to be partitioned? Certainly, the court had jurisdiction of the defendant by due service of the process. Equally it had the power to adjudicate concerning the general question involved; that is, what estates are subject to be partitioned. The question of jurisdiction, in a particular case, turns upon the answer to the question, Had the circuit court power to "hear and determine," "to pronounce judgment" on the question whether the plaintiff has a right to the relief which he asks? "Jurisdiction does not relate to the right of the parties as between each other, but to the power of the court. The question of its existence is an abstract inquiry, not involving the existence of an equity to be enforced, nor the right of the plaintiff to avail himself of it if it exists. It precedes these questions, and a decision upholding the jurisdiction of the court is entirely consistent with a denial of any equity, either in the plaintiff or in any one else. The case we are considering illustrates the distinction I am endeavoring to point out as well as any supposed case would. It presents these questions: Have the plaintiffs shown any right to the relief which they seek? And has the court authority to determine whether or not they have shown

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such a right? A wrong determination of the question first stated is error, but can be re-examined only on appeal. The other question is the question of jurisdiction." JOHNSON, J., in *People ex rel. Davis v. Sturdevant*, 9 N. Y. 263–269. The question is not whether the court decided rightly, but whether it became its duty to decide at all whether the plaintiffs were or were not entitled to the relief which they sought. If such was the court's duty, it had jurisdiction; and its decision, be it correct or erroneous, is the law of the case until it shall be reversed upon appeal, and can only be questioned upon a direct proceeding to review it, and not collaterally. Id. 267. It seems that in the case at bar it cannot be doubted that it became the duty of the court to determine whether the plaintiffs were entitled to the relief which they had demanded in their complaint. Whether it decided rightly or wrongly does not relate to the question of jurisdiction.

Of the same purport are the decisions of this court. An early case — *Tallman v. McCarty*, 11 Wis. 401 — has been many times cited and followed as an authoritative case. In that case the rule is stated by DIXON, C. J., as follows: "No order which the court is empowered, under any circumstances in the course of a proceeding over which it has jurisdiction, to make, can be treated as a nullity merely because it was made improvidently or in a manner not warranted by law or the previous state of the case. The only question in such case is, Had the court or tribunal the power, *under any circumstances*, to make the order or perform the act? If this be answered in the affirmative, then its decision upon *those circumstances* becomes final and conclusive, until reversed by a direct proceeding for that purpose. In the case before us, it was for the circuit court to determine, in the first instance, when and how the authority with which it was invested to direct a sale should be exercised; and if, in so doing, it committed an

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error, no matter how egregious, whether in the construction of the statute or otherwise, still the order was valid until reversed upon appeal. It was a mere error or irregularity, which could only be taken advantage of by appeal, but cannot be inquired into in this proceeding." This was a motion to set aside an order of sale in a partition action, on the ground that the court had not rendered the preliminary judgment required by law, determining the rights of the parties. The court held that to be a mere irregularity, which did not make the order of sale void so that it could be impeached collaterally on a motion. The rule as stated in *Tallman v. McCarty* has been followed quite uniformly in this state. *Salter v. Hilgen*, 40 Wis. 363; *Salisbury v. Chadbourne*, 45 Wis. 74; *Monroe v. Ft. Howard*, 50 Wis. 228; *Frankfurth v. Anderson*, 61 Wis. 107.

In the case at bar this court holds that the judgment and order of sale, so far as they affect the widow's homestead estate, are void for want of jurisdiction, for the reason that they are not warranted by law. But in *Frankfurth v. Anderson*, *supra*, judgments entered by the clerk by default, on complaints which did not state a cause of action, were held, on the authority of *Tallman v. McCarty*, to be irregular only, and not void. It is believed that the principle which governs that case should govern this case also. There is no distinction in principle possible. In either case the judgment entered was contrary to the law of the case. It was not warranted or authorized by the law. But it has never been the law in this state that the judgment of a court which had jurisdiction of the parties and of the subject matter is without jurisdiction, on the sole ground that it is not warranted by, or is contrary to, the law applicable to that particular case. That is the most that can be said against this judgment,— it was not authorized by the law. The court may have mistaken the law, but the mistake was within its jurisdiction. In *Monroe v. Ft. Howard*, 50 Wis.

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228, this court held that a judgment entered prematurely, and contrary to the express direction of a *mandatory statute* requiring proceedings to be stayed, was irregular only, and not void. See, also, *Johnston v. Oshkosh*, 65 Wis. 473.

The decisions of other courts are not entirely harmonious on this question. One, only, will be cited. *Dugan v. Baltimore*, 70 Md. 1. This is cited because it seems to be on all fours with the case at bar, and is the decision of an eminently respectable court. The right to make partition and sale in Maryland, as in this state, is governed by statute. The statute gave no power to the court to make partition or sale of an undivided parcel of land. The court entertained an action to make partition of an undivided one-fourth of a parcel of land, and, because partition could not be made, ordered it to be sold. In a collateral action it was insisted that the sale was not authorized by the statute and was void. The court agreed that the statute did not authorize the sale, but said: "But, while such is our construction of the statute, we cannot agree that the court, in passing the decree, had no jurisdiction of the subject matter, and that the purchaser acquired no title to the interest sold under it. The bill was filed for the partition or sale of an undivided fourth part of the property in which the plaintiff and defendants were tenants in common. It was filed under art. 16, sec. 99, of the Code. The court had a general jurisdiction to decree a sale of property held by cotenants, and it had the jurisdiction to determine whether, under the Code, it had the power to sell an undivided interest in the property. Jurisdiction is the power to hear and determine. If the judgment of the court is erroneous, the remedy is by appeal; and, until reversed upon appeal, the judgment is binding on the parties to the suit."

For these reasons, and on these authorities, it is believed that, if error exists, it is error merely, such as can be reviewed by this court upon appeal only, and cannot be cor-

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rected by motion after the term at which it was entered. *Frankfurth v. Anderson*, 61 Wis. 107. But it is doubted if error, even, is shown by this record. Error is not presumed. The burden is on him who alleges error to prove that it exists. *Cutler v. Hurlbut*, 29 Wis. 152-165. It probably is not true that in no circumstances could the court adjudge and order a sale of the widow's homestead estate in an action for partition. The widow's estate does not depend for its continuance on the circumstance of her continuing or failing to occupy the premises as her home. It is a life estate (*Ferguson v. Mason*, 60 Wis. 377, 387), upon condition that she do not remarry. There is no restriction upon her mode of enjoyment of the estate. She may lease it (*Anderson v. Coburn*, 27 Wis. 558, 567), or sell it (*Holbrook v. Wightman*, 31 Minn. 168), if that suits her convenience better. If she has power to sell it, she has power to consent to its sale upon an order of sale in a partition action. In that circumstance the court might lawfully make an order to sell it in a partition action. So it might become the duty of the circuit court to inquire and determine whether there was consent, and, as incidental to that inquiry, to determine whether consent was sufficiently proved; as whether the proof must be by a writing, whether oral consent in open court will do, or whether silence shall be construed as consent. Whether in this case there was consent the record does not disclose. It does not show that there was not consent. The widow did not defend, although the summons and complaint were served upon her personally. All the other parties to the action, both plaintiffs and defendants, were her children. Apparently it was a friendly action, agreed upon to promote the interest of all the parties by a sale of the entire title to all the lands. This view seems to be confirmed by her petition on which this motion is founded. The petition does not complain of the judgment or order of sale as being against her consent or

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wishes. Her only complaint is that she has been informed and fears that the judgment and order are void, so that a sale under the order would not convey her interest, and for that reason so favorable a price could not be realized for the lands. Her fear is not that a sale under the order would convey her interest, but that it would not. If she could know that the judgment and order are valid and not void, that removes her sole cause of anxiety and promotes her purpose. It is believed that they are both valid and, presumptively at least, regular, and are in all respects in accord with the wishes of the parties.

The order of the circuit court should be affirmed.

BEHL, Respondent, vs. SCHUETT and another, Appellants.

October 6 — October 23, 1894.

Promissory notes: Duress: Court and jury.

In an action upon a promissory note the evidence tended to show, among other things, that plaintiff had procured defendant's arrest in an action for false imprisonment, and had caused him to be taken at once a long distance from his home and friends, thus depriving him of the opportunity to give bail; that plaintiff and his attorney then refused sufficient bail, which was offered, and refused to give defendant an opportunity to get other bail, and made him believe that he could avoid going to jail only by settling with them; and that he settled accordingly, giving the note in suit. *Held*, that it was a question for the jury whether the defense of fraud and duress was established.

APPEAL from the Circuit Court for *Dodge* County.

The action was upon a promissory note given by the defendants to the plaintiff. The defense was that the note was obtained by the plaintiff from the defendants by means of fraud and duress.

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The trial was before a jury. The evidence in support of the defense tended to show that the plaintiff and his wife brought an action against the defendant *William Christian* for false imprisonment and malicious prosecution, laying their damages at the sum of $20,000; that they procured a warrant of arrest in said action, from a court commissioner of Milwaukee county, for the arrest of said *William Christian*, with directions to arrest and hold him to bail in the sum of $10,000; that such warrant was placed in the hands of the sheriff of Dodge county, where the said *Christian* resides, with instructions to arrest and take him to the city of Milwaukee by the early morning train on January 23, 1893; that said sheriff did arrest him at 3 o'clock in the morning of that day, and took him to the city of Milwaukee by an early train, a long distance from his home and away from his friends, depriving him of an opportunity to consult his friends or to give bail, which he was perfectly able there to do; that at Milwaukee he was taken at once to the office of the plaintiff's attorney in that action, where the plaintiff and his attorney both were; that they refused sufficient bail, which was offered, and refused to give him an opportunity to get other bail, but kept insisting that he should either settle or go to jail; that defendant was made to believe that there was no other way for him to avoid going to jail except to settle; so he settled, and gave the note in suit. Much of this was denied by the plaintiff and his witnesses.

The court directed a verdict for the plaintiff for the amount of the note. From judgment on the verdict the defendants appeal.

George W. Sloan and *James J. Dick*, for the appellants, argued, among other things, that the note was extorted by duress of imprisonment. *Brown v. Peck*, 2 Wis. 261; *Heckman v. Swartz*, 64 id. 48; *Schultz v. Culbertson*, 49 id. 122; *Richardson v. Duncan*, 3 N. H. 508; *Severance v. Kimball*,

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8 id. 386; *Morse v. Woodworth*, 155 Mass. 233; *Schultz v. Catlin*, 78 Wis. 611; *Magoon v. Reber*, 76 id. 392. Duress is a question of fact for the jury. *Schultz v. Culbertson*, 46 Wis. 316; *Cribbs v. Sowle*, 87 Mich. 340; *Osborn v. Robbins*, 36 N. Y. 374.

C. W. Briggs, for the respondent.

NEWMAN, J. It is the opinion of this court that the case should not have been taken from the jury. The evidence was certainly conflicting and contradictory. What it proved was fairly a question for the jury, under proper instructions. The testimony which tended to support the defense, if the jury believed it, was sufficient, with the inferences which the jury might legitimately have drawn from it, to establish the defense. It was the office of the jury to determine whether the witnesses were credible and the evidence to be believed, as well as what weight ought to be given to it and to each part of it.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

LAWRENCE, by guardian *ad litem*, Respondent, vs. CLEARY and another, Appellants.

October 6 — October 23, 1894.

Malicious prosecution: Determination against plaintiff: Pleading.

In an action for malicious prosecution, a complaint showing that such prosecution was finally determined against plaintiff, and not alleging that the judgment therein was procured by any fraud, misrepresentation, deceit, or circumvention practiced upon plaintiff, is insufficient.

APPEAL from the Circuit Court for *Waukesha* County.

The complaint alleges, in effect, that the plaintiff is an unmarried female, of the age of eighteen years; that one

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Armin had been appointed her guardian, and qualified as such; that September 29, 1893, the defendant *Cleary*, acting for and under the direction of the defendant *Kelly*, maliciously and without any probable cause made a complaint on oath before Justice Evans, charging the plaintiff, in effect, with having committed the offense defined in sec. 4438*b*, S. & B. Ann. Stats. (ch. 251, Laws 1889), and maliciously and without probable cause procured the said justice to issue a warrant upon said complaint for the arrest of the plaintiff upon said false charge; that said warrant was duly issued thereon, and the plaintiff arrested and brought before said justice, whereupon the complaint was read to her, and she was then and there, in effect, told that she was arrested for the offense mentioned; that having but very little education, and being greatly terrified and excited, and not understanding the meaning of what was so read and said, except that she was under arrest for not paying for her board, and was indebted to *Kelly* therefor, she thereupon admitted that fact to the justice; that the justice thereupon sentenced her to pay a fine and the costs, or be committed to jail for ten days; that, not being able to pay the fine and costs, she was committed for the term mentioned; that, at the time, *Kelly* held her trunk and clothing therein, of the value of $13, as security for the bill she owed him; and that *Kelly* knew said property in his hands was good and ample security for said bill, but that he concealed that fact from the justice.

To that complaint the defendants demurred on the ground that it did not state facts sufficient to constitute a cause of action. From the order overruling that demurrer the defendants appeal.

For the appellants there was a brief by *Ryan & Merton*, and oral argument by *E. Merton*.

For the respondent the cause was submitted on the brief of *Armin & Tichenor*. They contended, *inter alia*, that

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the rule that the prosecution must have terminated in favor of the plaintiff is not applicable where the accused had no opportunity to defend. 14 Am. & Eng. Ency. of Law, 29. Nor if the action terminated in conviction procured by fraud or perjury of defendant. *Palmer v. Avery*, 41 Barb. 290; *Burt v. Place*, 4 Wend. 591; *Witham v. Gowen*, 14 Me. 362; *Payson v. Caswell*, 22 id. 212; Newell, Mal. Pros. 284, 296–299; Cooley, Torts, 185.

CASSODAY, J. Neither the sufficiency of the complaint nor the warrant issued thereon is questioned. Upon being brought before the justice, and the warrant being read to the plaintiff, she manifestly pleaded guilty to the same, and was thereupon sentenced as mentioned. It is not alleged — certainly not sufficiently alleged — that such judgment was procured by any fraud, misrepresentation, deceit, or circumvention practiced upon the plaintiff. No appeal has ever been taken from that judgment. The prosecution was thus finally determined against the plaintiff. These things being so, the question recurs whether this action for malicious prosecution can be maintained.

To sustain an action for malicious prosecution, the failure of the proceedings against the plaintiff must be alleged and proved. *Woodworth v. Mills*, 61 Wis. 44; *King v. Johnston*, 81 Wis. 578; *Lowe v. Wartman*, 47 N. J. Law, 413; *Comm. v. McClusky*, 151 Mass. 488; *Stewart v. Sonneborn*, 98 U. S. 187; *West v. Hayes*, 104 Ind. 254; 2 Greenl. Ev. sec. 452; *Herman v. Brookerhoff*, 8 Watts, 240. Some courts go to the extent of holding that such conviction of the plaintiff of the offense charged, before a justice of the peace having jurisdiction, is conclusive evidence of probable cause of the plaintiff's guilt of the offense for which he was so prosecuted. *Whitney v. Peckham*, 15 Mass. 243; *Cloon v. Gerry*, 13 Gray, 201; *Dennehey v. Woodsum*, 100 Mass. 195. In Iowa it is held that such conviction is only

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prima facie evidence of such probable cause. *Moffatt v. Fisher*, 47 Iowa, 473; *Bowman v. Brown*, 52 Iowa, 437; *Olson v. Neal*, 63 Iowa, 214. But these cases probably go no further than to hold that such judgment is not so conclusive as to bar the convicted person from alleging and proving that the same was procured by fraud, collusion, perjury, and the like. In any view of the question, the demurrer in this case was improperly overruled.

By the Court.— The order of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

HACKBARTH, Respondent, vs. WOLLNER and wife, Appellants.

October 6 — October 23, 1894.

(1) *Land contract: Sale of known farm: Mention of quantity.* (2) *Delivery of personal property: Demand: Pleading.*

1. A contract by a man and his wife to sell and convey "their homestead farm, being seventeen acres in the town of P. and fifty-four and one-half acres in the town of G., together with all the farming implements," etc., is *held* to be a contract for the sale of a known farm and not of a specified quantity of land, the mention of the number of acres being for the purpose of description only.
2. No time being specified in such contract for delivery of the personal property, a mere failure of the vendors to deliver it is not a breach of the contract if the vendee has never taken possession of the farm nor demanded possession thereof or of the personal property.

APPEAL from the Circuit Court for *Ozaukee* County.

This is an action for breach of a contract to convey certain real estate and personal property. The complaint alleges that the plaintiff and the defendant *Michael Wollner* and his wife made a written agreement, April 8, 1892, a copy of which is attached to the complaint. The material parts of the agreement are that *Wollner* and his wife

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agree to sell and convey by warranty deed on or before June 1, 1892, "their homestead farm," being seventeen acres in the town of Port Washington, and fifty-four and one-half acres in the town of Grafton, Ozaukee county, together with all and singular farming implements and utensils, and all stock and crops and grain, excepting one cow and one ton of hay. In payment thereof *Hackbarth* agrees to convey certain real estate in Milwaukee on or about June 1, 1892, and give mortgages on the farm for $4,000.

The complaint alleges that plaintiff performed all the conditions of the agreement on his part, and then ascertained that the farm only contained sixty-nine and one-half acres of land, but that he accepted a deed from defendants which specified that the farm contained sixty-nine and one-half acres, on the assurance of the defendants that in fact it contained seventy-one and one-half acres. As breaches of the contract, the plaintiff alleges the fact that defendants only conveyed sixty-nine and one-half acres, when they agreed to convey seventy-one and one-half acres; also, "that defendants have failed to deliver to the plaintiff other personal property which they were to deliver to him according to said contract, to wit, one wheelbarrow, worth two dollars, milk cans, . . . worth six dollars, and one watch dog, worth ten dollars." A general demurrer to this complaint was overruled, and defendants appealed.

James F. Trottman, for the appellants.

For the respondent the cause was submitted on the brief of *H. B. Schwin.*

WINSLOW, J. Whether the original contract had been merged in the deed, we shall not consider, because we are very well satisfied that this was a contract to convey a known farm, and that the mention of the number of acres was only for the purpose of description. The sale was a

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sale of the "homestead farm," and not of a specified number of acres. The case of *Docter v. Furch*, 76 Wis. 153, is conclusive on this point, and nothing need be added to the discussion of the question contained in that case.

As to the personal property, the allegations are entirely insufficient to make a good cause of action. The contract simply provides that the personal property named is to be conveyed to plaintiff, but no time of delivery is specified. The necessary inference is that it was to be left on the farm, or delivered when the plaintiff took possession. It does not appear from the complaint that plaintiff has ever taken possession of the farm, or demanded possession either of the farm or the personal property. We cannot assume either of these facts, and in the absence of either of them there does not appear to have been any breach of the contract.

By the Court.— Order reversed, and action remanded with directions to sustain the demurrer to the complaint.

JONES, Appellant, vs. BURTIS, Respondent.

October 6 — October 23, 1894.

Pleading: Counterclaim: Physicians and surgeons: Malpractice.

1. In an action for services as a physician the answer, "by way of a further and second counterclaim," alleged malpractice, and that defendant had paid plaintiff a certain sum which he had not earned by reason of his want of skill, etc., and that defendant claims to recover the same back "as a counterclaim against him herein." A separate paragraph, immediately following, stated "that in consequence of his want of medical skill and of his failure to treat her as he should have done, as a skilful physician and surgeon, *as above set forth*" defendant suffered damage to a certain amount, "and sets up the same in this answer as a counterclaim," etc. *Held*, that

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all the allegations mentioned constituted but one counterclaim, with a statement of separate items of damage under it.

2. To state a cause of action against a physician for malpractice, it is not necessary to aver that it was his duty to act skilfully, since that will be implied from his employment as a physician.

APPEAL from the Circuit Court for *Waukesha* County.

The plaintiff sued to recover a balance of $410 alleged to be due him from the defendant for services rendered to her as a physician and surgeon, and also for $69.50 for moneys had and received by the defendant to his use. The defendant, after answering the allegations of the complaint, interposed a counterclaim, to which the plaintiff replied, and she also set up, "by way of a further and second counterclaim," a cause of action for malpractice, in a diffuse, prolix, and somewhat inartificial manner, and after alleging as damages, in consequence, that she was made much worse and her malady more stubborn and difficult to cure, and that she was required to and did make large expenditures, in consequence of the plaintiff's want of medical skill, before she could be cured, and that she had paid plaintiff $260 for said services which he did not earn by reason of his said want of skill, she claimed in this action to recover the same back "as a counterclaim against him herein." Immediately succeeding this claim was a paragraph as follows: "And that in consequence of his want of medical skill, and of his failure to treat her as he should have done, as a skilful physician and surgeon, *as above set forth*, she did suffer damages, both mental and physical, on account of such failure, neglect, and want of skill, to the amount of $5,000, for which she claims damage against him, and sets up the same in this answer as a counterclaim and cause of action accruing to her," etc.

The plaintiff treated all the matter subsequent to the counterclaim to which he replied as containing two other counterclaims, and demurred thereto separately, regarding

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the last paragraph as a separate and third counterclaim. The circuit court made an order overruling these demurrers, from which the plaintiff appealed.

Geo. E. Robinson, for the appellant.

Warham Parks, for the respondent.

PINNEY, J. It is plain that the circuit court properly regarded all that part of the answer after the first counterclaim, to which the plaintiff replied, as constituting but one counterclaim, denominated and numbered by the pleader as his second counterclaim. It is true that, after setting forth the facts upon which the defendant relied to establish the plaintiff's liability for malpractice, she quite unnecessarily states that she claimed to recover back what she had paid him, *as a counterclaim*, and then, in the next paragraph, states that in consequence of his failure to treat her properly, as a skilful physician and surgeon, "as above set forth," she claimed $5,000 damages for her consequent physical and mental suffering, "as a counterclaim and cause of action," etc. This paragraph expressly refers back to what precedes it, and the statement is, in substance, that she claims these several items of damages stated as counterclaims, or, in other words, as separate items of damage under her second counterclaim, properly numbered and denominated as such. While the pleading is inartificially and loosely drawn, we must put a fair and reasonable construction upon it as a whole, and not a strained one which will defeat it or render it insufficient.

It was sufficient for the defendant to aver that the plaintiff was a physician and surgeon; that the defendant retained and employed him as such to attend upon her for reward; that he accepted and entered upon such employment, yet the plaintiff conducted himself in an ignorant, unskilful, and negligent manner, whereby the defendant became worse, and was greatly injured in her health, and suffered

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from pain, etc., to her damage, etc. 2 Chit. Pl. 607, and cases in note; *Peck v. Martin*, 17 Ind. 115. All these necessary averments are found, in substance, in the second counterclaim. The employment of the plaintiff as a physician and surgeon by the defendant is expressly alleged, and in substance that at the time he falsely represented to her that he possessed the necessary knowledge, etc., as a medical practitioner. It was not necessary to expressly aver that it was the plaintiff's duty to act skilfully. His duty will be implied from his employment as a physician and surgeon. Construing the second counterclaim as embracing all the matter which the plaintiff's counsel has treated as a third counterclaim, it is clear that the second counterclaim sets out a single, valid cause of action for malpractice, with an enumeration of different claims of damages under it. The plaintiff's demurrers were therefore properly overruled.

By the Court.—The order of the circuit court is affirmed.

THE STATE, Appellant, vs. WOLFRUM, Respondent.

October 6 — October 23, 1894.

Taxation: False statement of property: Penalty: Verdict.

In an action for the penalty prescribed by sec. 1, ch. 381, Laws of 1889, for intentionally making a false statement of property to the board of review for the purpose of avoiding payment of the just taxes thereon, a verdict finding "the defendant guilty, not crimanly, but negligently, in not returning to the board of review in the sum of $4.125, making the penalty $410," is *held* to pass sufficiently upon all the issues, and to be, in effect, a verdict for the defendant.

APPEAL from the Circuit Court for *Washington* County.

This is an action brought in the circuit court to recover the forfeiture provided by sec. 1, ch. 381, Laws of 1889, on

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the claim that the defendant had intentionally made a false statement to the board of review of his assessment district, for the purpose of avoiding his just share of taxes. The statute under which the action was brought is as follows:

"Section 1. Any person, firm or corporation in this state owning or holding personal property of any nature or description, individually or as agent, trustee, guardian, administrator or receiver, which property is subject to assessment and not exempted as otherwise provided, who shall at the time when the assessment is made in any one year, intentionally make a false statement to the assessor of his respective assessment district or to the board of review thereof, for the purpose of avoiding the payment of the just and proportionate taxes thereon, shall, upon conviction thereof, forfeit the sum of ten dollars for every one hundred dollars or major fraction thereof so withheld from the knowledge of the assessor and the statement so made in any one year."

The case was tried by a jury, and resulted in a verdict in the following words: "This jurors find the defendant guilty, not crimanly, but negligently, in not returning to the board of review in the sum of $4,125, making the penalty $410, as this jury agree." On this verdict the court entered a judgment in favor of the defendant. From this judgment the plaintiff appeals.

P. O'Meara, for the appellant.

For the respondent there was a brief by *Barney & Kuechenmeister*, and oral argument by *S. S. Barney*.

NEWMAN, J. The questions are whether this verdict passed substantially on all the issues in the action, and is a verdict for the defendant. If it does pass substantially on all the issues and is for the defendant, then the judgment is right and must be affirmed; otherwise, it is a mistrial and a new trial must be had.

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What the defendant was accused of was the making of a false statement of the property in his hands subject to assessment, intentionally, for the purpose of avoiding the payment of the just and proportionate taxes thereon. The action is penal. The case must be fully shown to be within the statute. No presumptions or intendments aid it. The question arises on the verdict. To sustain the action, the jury must find the gravamen of the charge against the defendant. The gravamen of the charge is the intention with which the act was done. The verdict is, in effect, a special verdict. The jury finds and reports the facts to the court. The court applies the law to the facts found by the jury. What the jury meant by their verdict may not be clearly evident. So the verdict is to be construed. The office of construction is to ascertain what the jury meant. They say the defendant is "guilty." Without more, that would mean guilty of the whole matter charged. But the jury say more. They explain what they mean by saying "guilty." They say "not crimanly, but negligently." This seems to mean that the jury find his act in making the false statement was not prompted by a criminal purpose, but was done with too little care to insure accuracy. The law does not exact its penalty simply for the use of too little care — that is, for negligence — in making the statement, but only for a statement made intentionally false. The statute, being penal, requires a strict construction. So the verdict is construed to mean that the jury find that the defendant did not make the statement false intentionally, but that its falsity resulted from his bestowing upon its making too little care to insure accuracy. They find affirmatively that the element which was the gravamen of the charge did not exist.

The verdict passes sufficiently upon all the issues, and is, in effect, for the defendant.

By the Court.— The judgment of the circuit court is affirmed.

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THE STATE, Appellant, vs. DUFF, Respondent.

October 6 — October 23, 1894.

Appeal: Review: Bill of exceptions.

If, in an action tried by a jury, there is no bill of exceptions containing all the evidence, the only question on appeal is whether the verdict and judgment are supported by the pleadings.

APPEAL from the Circuit Court for *Waukesha* County.

Action to recover the penalty for failure to remove an encroachment upon a public highway. The appeal is from a judgment entered upon a verdict directed by the court in favor of the defendant.

For the appellant the cause was submitted on the brief of *C. E. Armin.*

For the respondent there was a brief by *Ryan & Merton*, and oral argument by *E. Merton.*

ORTON, C. J. The facts of this case are sufficiently stated on the former appeal, in 80 Wis. 13. The only question on this appeal is whether the defendant held the *locus in quo* by adverse possession. This question depends upon the evidence and the whole evidence in the case. We have looked into the two bills of exceptions to find where the trial judge has certified that either of them contains all the evidence. This seems to have been omitted. In such case the only question is whether the verdict and judgment are supported by the pleadings, and this appears to be the case. We regret that this case cannot be fully considered, but it cannot now be remedied.

By the Court.— The judgment of the circuit court is affirmed.

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FINTEL and another, Appellants, vs. COOK, Respondent.

October 6 — October 23, 1894.

(1) *Agency: Estoppel: Sale on approval: Acceptance.* (2) *Justices' courts: Appeal: Bill of exceptions.*

1. The minor sons of a farmer, who were running the farm in his absence, agreed to purchase a corn planter on condition that it should do good work. They used it in planting their corn and that of a neighbor, and gave no notice to the vendor that it was unsatisfactory. The father knew, within two days, that the machine was at his farm on trial, but made no attempt to disaffirm the purchase until about a month later, when he had his sons write to the vendor that he would not keep the machine. *Held*, that he could not then deny the authority of his sons to make the purchase as his agents, and that by said use and retention of the machine the right to return it had been waived.
2. Where an appeal from a justice's judgment for less than $15 was heard in the appellate court on the original papers and the return of the justice, no other bill of exceptions is necessary on appeal to the supreme court; and the latter court may order an affirmative judgment according to the weight of the evidence and the justice of the case.

APPEAL from the County Court of *Waukesha* County.

This action was commenced in a justice's court, and the plaintiffs made therein an oral complaint to the effect that June 7, 1892, the plaintiffs sold and delivered to the defendant, at his instance, one Stark force-drop corn planter, of the value and for the agreed price of $45, which corn planter the defendant received and used and continued to keep, but had never paid for any part of it though several times demanded; and demanded judgment for the amount named, with costs. The defendant answered by way of a general denial, and alleged, in effect, that the corn planter was left with his minor sons without his knowledge or consent; that he immediately informed the plaintiffs that he did not want the corn planter and would not keep or pay

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for the same; that its work was unsatisfactory; and further alleged, by way of counterclaim, a charge of five dollars for storage.

At the close of the trial before the justice, he rendered his judgment in favor of the defendant for six cents damages on his counterclaim, and costs, from which the plaintiffs appealed to the county court, wherein the cause was tried upon the record, and the judgment of the justice in all things affirmed. From that judgment the plaintiffs appeal.

For the appellants there was a brief by *W. A. Pierce*, attorney, and *T. W. Haight* and *E. M. Mc Vicker*, of counsel, and oral argument by *Mr. Pierce* and *Mr. Mc Vicker*.

For the respondent there was a brief by *Ryan & Merton*, and oral argument by *E. Merton*.

CASSODAY, J. It appears from the evidence, pretty clearly, that June 8, 1892, the defendant was attending court as a juryman; that his farm at the time was being worked by his two minor sons; that on that day the sons made a contract for the purchase of the machine for the price named, conditioned upon its doing good work; that one of the sons thereupon went and got the machine, and commenced using the same, planting corn on the defendant's farm; that when the son got the machine one of the plaintiffs went with him, and started the machine, and planted between half an acre and an acre, and that it did the work well; that it was agreed that the sons would notify the plaintiffs if it did not do good work, but that no such notice was ever given; that the machine continued to do good work, and that the sons repeatedly expressed themselves satisfied with it; that, within two days after the machine was so taken to the defendant's farm, the defendant knew the machine was there on trial; that a week or so after getting the machine, as mentioned, the boys used it planting corn

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for their uncle; that they finished the planting of their corn about June 16, 1892. The defendant and his sons deny several of the facts stated, and testified to the effect that they could not tell whether the machine worked satisfactorily until they ascertained whether the corn grew; and the defendant himself testified that, as soon as he saw what kind of work the machine did, he told his boys to instruct the plaintiffs that he would not keep the machine. Accordingly, one of the sons wrote the plaintiffs, under date of July 5, 1892, to the effect that the machine had not given satisfaction, and that they would return it as soon as they should have the time. That letter was signed "C. N. Cook and Son."

It is very apparent that the sons acted as the agents of the defendant in making the purchase. A principal who, after knowledge of the terms of a sale or purchase made by the agent, does not disaffirm, but accepts and enjoys all the benefits thereof, cannot afterwards deny the authority of the agent to make the same upon the terms agreed upon. *Parish v. Reeve*, 63 Wis. 315; *Strasser v. Conklin*, 54 Wis. 102; *Morse v. Ryan*, 26 Wis. 356; *Burke v. M., L. S. & W. R. Co.* 83 Wis. 415. The defendant retained the machine for about a month before attempting a disaffirmance. That was certainly an unreasonable length of time to retain the machine for the purpose of testing it. Such retention and the use of the machine as mentioned were a waiver of any right to return the same. *Palmer v. Banfield*, 86 Wis. 441.

The judgment in the justice's court, exclusive of costs, did not exceed $15; and as there was no affidavit, as prescribed by sec. 3768, R. S., the appeal was necessarily heard in the county court on the original papers and the return of the justice. In such a case no other bill of exceptions is necessary on appeal to this court. Sec. 3767, R. S. That, however, does not prevent this court from ordering an affirmative judgment in favor of the plaintiffs, according to

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the weight of the evidence and the justice of the case. Sec. 3769, R. S., as amended by ch. 216, Laws of 1891; *Silvernail v. Rust*, *ante*, p. 458.

By the Court.— The judgment of the county court is reversed, and the cause is remanded with direction to enter judgment in favor of the plaintiffs, and against the defendant, for the amount of the agreed price of the machine, and interest from June 8, 1892.

WOOD and others, Appellants, vs. ARMOUR, Respondent.

October 8 — October 23, 1894.

Married women: Acquisition of tax title to land in husband's possession: Adverse possession: Agency of husband.

A married woman, if acting in good faith, may acquire with her separate estate a tax title to land, although her husband is in possession thereof and under legal obligation to pay the taxes; and after she has acquired such title and had it put on record her possession of the land through tenants will be none the less adverse to the original owner because her husband acts as her agent in the management of the property.

APPEAL from the Circuit Court for *Waukesha* County.

This is an action of ejectment tried by the court. The evidence showed that prior to February 14, 1850, one Curtis Mann held the title in fee to a quarter section of land, a part of which is in controversy in this action. On the last-named date he deeded the entire property to one John P. Wood, who was then living in Hartford, N. Y., and who died in September, 1864, still holding the paper title to said lands. The plaintiffs in this action are his widow and heirs at law. At the time of the execution of said deed, Wood and Mann were copartners in the grain and commission

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business at Buffalo, N. Y.; Wood then living at said Hartford, and Mann at Buffalo. The evidence fails to show what consideration passed for the execution of said deed, or whether in fact there was any consideration. There was some evidence which tended to indicate that the deed was probably executed by Mann in order to place the title of the property beyond the reach of his creditors. There was also evidence indicating that the deed might have been given as security for moneys advanced by Wood to Mann. At the time of the execution of said deed the land was leased to a tenant, and continued in that situation for several years, but it is not entirely clear from the evidence whether the rents and profits were received by Mann or by Wood.

In April, 1856, Mann moved to this state with his family, and went into possession of said quarter section of land, with other adjoining lands upon which he lived. It was fenced and cultivated. The character of Mann's entry and possession is in dispute; the plaintiffs claiming that such entry and possession were permissive, while the defendants claim that they were hostile and adverse. The evidence shows further that Mann remained in actual possession until August, 1887. He paid all taxes until November, 1877, when he became insolvent and paid no further taxes.

The taxes not being paid, the land was sold for the unpaid taxes in 1883 and 1884, and tax deeds, which were fair on their face, were issued to Warham Parks, the holder of the tax certificate, in August, 1887. During the same month, Nancy M. Mann, the wife of Curtis Mann, bought the title of the tax-title holder with money arising from her separate property, and received a deed therefor. The land was then in possession of tenants. After receiving her deed, Nancy Mann received the rents of the land thereafter accruing, made repairs, and paid all necessary help upon the land, redeemed unpaid taxes, and paid the cur-

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rent taxes thereon, her husband acting as her agent. September 28, 1892, the land in controversy in this action, being a part of said quarter section, was conveyed by Nancy Mann to one Morse, who afterwards conveyed the same to the defendant.

The circuit court found, among other things, that the land had been adversely possessed by Curtis Mann for more than twenty years, and that the tax title acquired by Nancy Mann was valid, and had been followed by adverse possession for more than three years. Judgment was entered for the defendant, from which the plaintiffs appeal.

For the appellants there was a brief by *Quarles, Spence & Quarles*, and oral argument by *Charles Quarles*.

For the respondent there was a brief by *Warham Parks*, attorney, and *Ryan & Merton*, of counsel, and oral argument by *Mr. Parks* and *Mr. E. Merton*.

WINSLOW, J. The record is quite voluminous. The foregoing statement does not state all of the facts which appear in evidence, but it is believed that it states all the facts which are material to the decision of the case. The question was much discussed, both in the briefs and in the argument, whether Curtis Mann's entry and subsequent possession were adverse. In the view we have taken of the case, we find it unnecessary to decide this question. When the tax deed was executed the title to the property was either in the plaintiffs or in Curtis Mann, and in either event it was entirely competent for Nancy Mann, out of her separate estate, to purchase that tax title. The tax deeds were fair on their face. No irregularity is shown or claimed in the levy of the tax upon which they were based. Hence, they conveyed a title in fee simple, unless there was some legal reason why Nancy Mann could not purchase that title.

It is suggested that Curtis Mann could not acquire the tax title, because he was in possession of the land and it

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was assessed to him, so that he was under legal obligation to pay the taxes. However much force this argument might have against a title acquired by Curtis Mann, or by a third person collusively for Mann's benefit, it has no force against Mrs. Mann, who was not in possession and was under no obligation to protect the title. No duty rested on her to pay the taxes on these lands, whether they belonged to her husband or to the plaintiffs. She had a separate estate, and if she chose to use a part of it in purchasing a tax title on these lands in good faith and for her own benefit, we know of no rule, in the present state of the law as to the property rights of married women, which would prevent her from doing so. The evidence showed, and the court rightly found, that after such purchase she went into possession of the lands in question, and held such possession until she conveyed the same to the defendant's grantor. The actual manual possession during this time was in tenants, but we think the possession of these tenants, under the facts, must be held to be the possession of Mrs. Mann. She received the rents and profits, built fences, repaired buildings, paid the taxes, and managed the property as her own. It is true that her husband acted as her agent in many of these matters, but it is entirely competent for the husband to so act in the transaction of his wife's separate business, and we do not see how this is to prejudice the wife's rights. Certainly, no one has had possession adverse to her since she acquired title. The plaintiffs have not, and her husband has not, nor have the tenants. She put her title on record at once, thus announcing to all the world, including the plaintiffs, that she claimed title to the premises. This constituted not only a "challenge of the right of the original owner and all opposing claimants, but it was notice to them of its existence and presumed validity." *Knox v. Cleveland*, 13 Wis. 245.

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In any view which we have been able to take of the case, we have been unable to see why the tax title acquired by Nancy Mann did not vest in her a perfect title to the property, which is now vested in the defendant, her grantee.

By the Court.— Judgment affirmed.

WOOD and others, Appellants, vs. MCDOWELL and others, Respondents.

October 8 — October 23, 1894.

Wood v. Armour, ante, p. 488, followed.

APPEAL from the Circuit Court for *Waukesha* County.

For the appellants there was a brief by *Quarles, Spence & Quarles*, and oral argument by *Charles Quarles.*

For the respondents there was a brief by *Warham Parks*, attorney, and *Ryan & Merton*, of counsel, and oral argument by *Mr. Parks* and *Mr. E. Merton.*

WINSLOW, J. This action is an action of ejectment brought to recover a part of the same quarter section of land mentioned in the case of *Wood v. Armour, ante,* p. 488. The facts in this case are substantially identical with the facts in that case, and upon the principles there laid down the judgment in this case must also be affirmed.

By the Court.— Judgment affirmed.

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ECKEL, Appellant, vs. BOSTWICK and others, Respondents.

October 8 — October 23, 1894.

Specific performance: Oral contract to convey land: Evidence: Judgment.

1. Specific performance of an oral contract to convey land will not be enforced where the plaintiff's testimony as to the price to be paid is contradicted by that of defendant and is not corroborated by any other evidence.
2. The parol contract in such case being void, so that the plaintiff could have no remedy on it at law, a judgment dismissing his complaint on the merits is proper, and should not be modified so as to dismiss the complaint without prejudice. *Richards v. Allis*, 82 Wis. 509, distinguished.

APPEAL from the Circuit Court for *Ozaukee* County.

This is an action for the specific performance of an oral agreement alleged to have been made May 1, 1883, by which the defendant *John M. Bostwick*, the owner of the premises in question, agreed to sell and convey the same to the plaintiff for the sum of $150, which was to be paid when the said *Bostwick* would deliver to the plaintiff a warranty deed of the premises, and that the plaintiff should enter, as he did, into immediate possession, and has ever since held the same with the consent of the defendants. The plaintiff also alleges the making of certain improvements thereon, payment of taxes assessed subsequent to said purchase, and that within a month after such entry the plaintiff notified *Bostwick* that he was ready to make payment, and requested him to make him a deed, which he agreed to do; that said *Bostwick* had never made and delivered any deed to the plaintiff, but on the 9th of June, 1892, conveyed said premises to the defendant *Edward B. Bostwick;* that the plaintiff has been at all times, and still is, ready and willing to pay said consideration, with interest, upon receiving a proper deed, as the defendants well knew, but the

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defendant *John M. Bostwick* has at all times refused, and still does refuse, to make plaintiff a deed of said premises. Judgment was demanded permitting the plaintiff to pay said sum of $150 and interest into court, and that the defendants convey the premises, and for other relief.

The defendant *John M. Bostwick* answered in substance, that he purchased the premises of one Bohan for $150 and all back taxes thereon, agreeing to pay him whatever he (*Bostwick*) should receive on a sale thereof over the purchase price; that there were then outstanding taxes and tax certificates to the amount of $64.07, drawing interest, which he soon thereafter paid, and the full amount paid by him for said premises is $218.49; that he agreed to sell to the plaintiff said premises for the amount they should cost him, including extra taxes, and for no less consideration, and plaintiff agreed to pay therefor such amount, whatever it might be, the same being indefinite only as to taxes and interest thereon. Admitting the entry of the plaintiff into possession as alleged, it is averred that the defendant notified the plaintiff that he had a deed ready for delivery whenever the plaintiff should pay what said premises cost him, but that he had never paid or tendered the same or any part thereof; that he had been at all times ready and willing to perform the contract upon payment of such price, with interest, and still was ready and willing to do so; and that the defendant *Edward B. Bostwick*, who is his son, is now ready to deed said premises to the plaintiff according to such terms. The defendant *Edward B. Bostwick* in his answer avers that he is ready and willing to convey the premises to the plaintiff, or to whomsoever said *John M. Bostwick* shall request.

The court found that the allegations of the complaint were not proven, and gave judgment dismissing the complaint and for costs. The only evidence in support of the complaint was given by the plaintiff himself, and tends sub-

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stantially to support the allegations of his complaint, but he is wholly uncorroborated on the principal point as to the price to be paid. He testified, in substance: That he had asked the defendant *Bostwick* for a deed twice. That he went to him, having the money ready to pay. The latter said he had not the deed ready, but would have it in eight or ten days. Subsequently, he said there was a little matter of interest, and he said he would make it out and let him know. That he told him he had the money on hand, and had kept it for several years, thinking he would call with the deed. That, the winter or spring before the action was commenced, he went to him and tried to settle the matter, but was unable to accomplish anything. He denied that he was to pay more than $150, and admitted he had never tendered any money; that the disagreement was about the taxes; that he did not object to paying interest. W. H. Ramsey testified to being present at an interview between the parties, in which *Mr. Bostwick* said that when plaintiff paid him for the land he would get his deed, and not before; that they figured up some tax certificates and interest on the money from the time of purchase; that they could not agree on the interest or the tax certificates; that he understood the plaintiff objected to paying any interest on the purchase price. *Edward B. Bostwick* testified that he had been ready and willing at all times to deed the property to whomever his father desired him; that he was present at the conversation mentioned by the witness Ramsey, and that the difference seemed to be in regard to interest. The defendant *Bostwick* testified that he told the plaintiff he could have the property for what it cost him, and he said he would take it; that he had at all times been ready to give a deed upon payment according to the agreement; that the place had cost him, including tax certificates amounting to $68.49, in all, $218.49. There was no dispute except as to the interest. "At first he thought I ought not

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to charge any interest. We figured the amount, and were only $28 apart."

The court held that before bringing the action the plaintiff should have tendered the money and demanded a deed; that the proof, to justify specific performance, must be clear and convincing beyond a reasonable doubt; that it could not be granted unless the proof is entirely satisfactory, nor upon the unsupported testimony of the party, when it is denied by the other side. The plaintiff appealed from the judgment dismissing his complaint on the merits.

G. W. Foster, for the appellant.

D. M. Jackson, for the respondents.

PINNEY, J. The plaintiff relies upon on oral agreement for the conveyance of the premises, and part performance of it, to take the case out of the operation of the statute of frauds. The evidence seems to be sufficient to establish the contract upon all the material points, except in respect to the important and vital one of the price or consideration to be paid for the premises. Upon this point the parties flatly and positively contradict each other, and there is no evidence corroborating the plaintiff's statement. The result is that the contract is not made out with the clearness and certainty necessary to entitle the plaintiff to the relief prayed. In *Buxton v. Lister*, 3 Atk. 386, in speaking of contracts which the court will enforce, Lord HARDWICKE said: "Nothing is more established in this court than that every agreement of this kind ought to be *certain*, fair, and just in all its parts. If any of those ingredients are wanting in the case, the court will not decree specific performance." And in *Lord Walpole v. Lord Orford*, 3 Ves. Jr. 420, Lord ROSSLYN laid it down as a general proposition, to which he knew of no limitation, that "all agreements, in order to be executed in this court, must be certain and defined," and that "they must be proved in such manner

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as the law requires." Unless the evidence offered in support of the contract be fully sufficient and ample, a court of equity will not exercise its jurisdiction to enforce it (*Colson v. Thompson*, 2 Wheat. 336), although it is said that, where a contract has been partly executed by possession having been taken under it, the court "will strain its power to the utmost" (*Parker v. Taswell*, 2 De Gex & J. 559, 571). It is laid down in Fry on Specific Performance (sec. 335) that "price is an essential ingredient of the contract, and, where this is neither ascertained nor ascertainable, the contract is void for incompleteness, and incapable of enforcement." Incompleteness of contract and inability to satisfactorily establish it, in their bearing upon the plaintiff's right to relief, are substantially the same. It is the duty of the court to deny relief unless the contract is clearly and satisfactorily proven (*Hibbert v. Mackinnon*, 79 Wis. 673, 680; *Knoll v. Harvey*, 19 Wis. 99), for otherwise the court has no assurance that in interfering to decree specific performance it is not doing a great injustice. The rule is stated by Mr. Pomeroy in his work on Specific Performance (sec. 136) that "if, upon all the evidence given by both parties, the court is left in doubt as to the entire contract, or even as to any of its material terms, it will not grant the remedy, although a partial performance of something has been sufficiently proved;" and a great number of cases are cited to that effect. The application of this rule to the evidence before us is fatal to the plaintiff's case.

We were urged, in case we should be of the opinion that the judgment ought not to be reversed, to modify it so as to dismiss the plaintiff's complaint without prejudice; but as the judgment was upon the merits and is not erroneous, there is no legitimate ground upon which we can modify it in the least. The contract set up by the plaintiff is void, so that the plaintiff could have no remedy upon it at law, and there is therefore no ground upon which this court can

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properly modify the judgment, as was done in *Richards v. Allis*, 82 Wis. 509, 514. The judgment of the circuit court is correct and must be affirmed.

By the Court.— The judgment of the circuit court is affirmed.

BOHAN, Respondent, vs. OZAUKEE COUNTY, Appellant.

October 8 — October 23, 1894.

Publication of legal notices: Compensation.

1. Parcels of land which have been properly assessed together as one tract constitute but one "lot or tract" within the meaning of sec. 1174, R. S., and but one fee is due for the publication thereof in the tax redemption notice.
2. An election notice, with the nominations and information to voters, required to be published by secs. 11, 12, ch. 379, Laws of 1891, is a "legal notice" within the definition in sec. 4276, R. S., and the fees for publishing it are those prescribed in sec. 4275.
3. The word "folio," as used in said sec. 4275, means, as defined in subd. 14, sec. 4971, R. S., "one hundred words or figures;" and, whatever the custom may be, compensation for publishing an election notice should be made according to the actual number of words and figures contained therein, and not according to the space occupied.

APPEAL from the Circuit Court for *Ozaukee* County.

The plaintiff is the publisher of a newspaper in the defendant county. He published the county clerk's tax redemption notice for the year 1892. In the same year he published the general election notice and the notice for information of voters required by ch. 379, Laws of 1891. For this service he presented his account to the board of supervisors:

To county clerk's tax list (dated July 26, 1892)	$13 50
To official ballot of November election, 1892, 1 page, or 120 inches, at 60 cents per inch	72 00
	$85 50

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The board allowed this account as follows:

To county clerk's tax list	$11 15
To official ballot	20 00
	$31 15

As to the tax list, the difference was as to the number of lots or tracts of land which it contained. The plaintiff claimed forty-five. The board contended there were but thirty-six. The dispute was as to the meaning of the words "lot or tract of land," in sec. 1174, R. S. The words are: "The printer who shall publish the list and notice . . . shall receive thirty cents for each lot or tract of land in such list. . . ." For example a description is: "Lots 1–2–3–4, block 10." Is this to be counted as one "lot or tract," or as four? The plaintiff claims four. The board says one. The count of either party is correct on its theory of what constitutes a lot or tract.

As to the election notice, the contention is as to whether it is a "legal notice," within the intention of sec. 4276, R. S., to be paid for at sixty cents a folio, under sec. 4275. The board claims that it is a "legal notice," under those sections. The plaintiff denies this. He says the publication is largely blank space, which by the custom of printers is counted one inch of column to the folio; that, to count it by the folio of 100 words and figures, the fee given by the statute would not cover the cost of the work. So he claims that it should be paid for, not at the statute rate, but so much as it shall be reasonably worth. By actual count it does not exceed twenty-five folios.

The plaintiff appealed from the order of the board to the circuit court. The circuit court, in accordance with plaintiff's contentions, directed a verdict for the plaintiff for $54.35. From a judgment on this verdict the county appeals.

For the appellant the cause was submitted on the brief of *H. B. Schwin*, district attorney.

D. M. Jackson, for the respondent.

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NEWMAN, J. Where parcels of land are contiguous and owned by the same person, they may be assessed together as one tract. R. S. sec. 1048. When such parcels or tracts of land are deemed by the assessor so improved or occupied with buildings as to be practically incapable of separate valuation, they may be assessed as one parcel. R. S. sec. 1045. There seems to be no reason why parcels of lands so properly assessed together as one tract, and treated as one tract for all purposes of taxation, should not be still treated as one tract when advertised for redemption from taxes. They could not be legally advertised separately or redeemed separately, for it could not be known how much of the aggregate tax is due from each of the parcels when separated. They must be advertised together, and are but one tract. One fee, only, is due for this advertisement.

Sec. 4275, R. S., prescribes the fee for publishing "a legal notice" at not more than sixty cents per folio for the first insertion, and thirty-five cents per folio for each subsequent insertion. Sec. 4276 defines the term "legal notice," as used in the former section. It is defined to "embrace every summons, order, citation, notice of sale, or other notice, and every other advertisement of any description, required to be published by law, or in pursuance of any law, or of any order of any court." The definition is very comprehensive. It certainly includes the advertisement made by the plaintiff, for that notice is expressly required to be published by secs. 11, 12, ch. 379, Laws of 1891.

"The term 'folio,' wherever it occurs, shall be construed to mean one hundred words or figures." R. S. sec. 4971, subd. 14. This statute cannot be construed. It is too plain for construction. It cannot be so extended as to include some estimate of the space upon the paper which the words and figures may occupy; nor can a plain statute be overridden by a custom, however well established. When the statute is invoked, it is the arbiter.

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Whether the plaintiff could be compelled to publish a legal notice for less than cost, under sec. 4274, is a question not presented by this record. He did publish this notice without compulsion.

The plaintiff had been paid the full legal fees for his work. He was not entitled to more.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

BOLENS, Respondent, vs. OZAUKEE COUNTY, Appellant.

October 8 — October 23, 1894.

Bohan v. Ozaukee Co., ante, p. 498, followed.

APPEAL from the Circuit Court for *Ozaukee* County.

The cause was submitted for the appellant on briefs by *H. B. Schwin,* district attorney, and for the respondent on the brief of *E. S. Turner.*

NEWMAN, J. This case presents the same question as the case of *Bohan v. Ozaukee Co., ante,* p. 498. The claim was for publishing the general election notice and information to voters for the year 1892. It had the same fortune before the county board and circuit court as *Bohan's Case.* It meets the same fate here.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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KOETTING, Plaintiff in error, vs. THE STATE, Defendant in error.

October 9 — October 23, 1894.

(1) *Milwaukee municipal court: Prejudice of judge: Calling in circuit judge.* (2) *Criminal law: Receiving deposits in insolvent bank: Pleading: Variance.*

1. By virtue of sec. 2500, R. S., as amended by ch. 256, Laws of 1879, ch. 435, Laws of 1887 (which provides that when an application is made in any circuit court for a change of venue on account of the prejudice of the judge, he may call upon any circuit judge to attend and hold his court for the trial of the case) applies to the municipal court of Milwaukee county. WINSLOW, J., dissents.
2. Under sec. 4541, R. S. (providing that any officer of any bank "who shall accept or receive on deposit, or for safe-keeping, or to loan, from any person, any money . . . when he knows, or has good reason to know, that such bank . . . . is unsafe or insolvent, shall be punished," etc.), where an information charges that the defendant accepted and received money "on deposit *and* for safe-keeping," it must be proved, in order to sustain a conviction, that the money was received for safe keeping, or as a special deposit, and proof of a general deposit is insufficient. CASSODAY and NEWMAN, JJ., dissent.

ERROR to the Municipal Court of *Milwaukee* County.

Information for fraudulently receiving deposits in a bank, under sec. 4541, R. S. The principal facts are stated in the opinion. The defendant having filed an affidavit of the prejudice of the judge of the municipal court and moved for a change of venue, the Honorable GEORGE CLEMENTSON, judge of the Fifth judicial circuit (a circuit not adjoining Milwaukee county), was requested by the judge of the municipal court to attend and hold said court for the trial of the case, and did so accordingly, and the motion for a change of venue was denied. A plea to the jurisdiction was afterwards overruled, and the defendant, having pleaded not guilty, was tried, convicted, and sentenced. He has sued out a writ of error.

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For the plaintiff in error there was a brief by *Williams & May*, and oral argument by *W. C. Williams*. They argued, *inter alia*, that sec. 2624*a* does not supplant sec. 4686*a*, and that sec. 4686*a* remains in force and is not repugnant to the other. Both may consist together, and the court will seek for and adopt such a construction. *Att'y Gen. ex rel. Taylor v. Brown*, 1 Wis. 525; *Att'y Gen. v. Railroad Cos.* 35 id. 554; *Bruce v. Schuyler*, 9 Ill. 274; *Ottawa v. La Salle*, 12 id. 339–341; *McCartee v. Orphan Asylum Soc.* 9 Cow. 437; *Haynes v. Jenks*, 2 Pick. 176; *Goddard v. Boston*, 20 id. 410; *Comm. v. Kimball*, 21 id. 373; *Snell v. Bridgewater C. G. Mfg. Co.* 24 id. 297; *Chesapeake & O. Canal Co. v. B. & O. R. Co.* 4 Gill & J. 152. In the information defendant is charged with receiving a special deposit for safe-keeping, and there is absolutely no evidence in the case to sustain the charge. There is, therefore, a fatal variance between the offense charged and the offense proved on the trial. *State v. Quinlan*, 40 Minn. 55; *McGary v. People*, 45 N. Y. 153; *Sykes v. People*, 132 Ill. 32; *Polkinghorne v. State*, 7 So. Rep. 347; *Comm. v. Grey*, 2 Gray, 501; 1 Bish. Crim. Proc. § 336; *Catlin v. Savings Bank*, 7 Conn. 483; *In re Franklin Bank*, 1 Paige, 251; *Nat. Bank v. Washington Co. Nat. Bank*, 5 Hun, 605; *Curtis v. Leavitt*, 15 N. Y. 9, 166, 177; *Marine Bank v. Fulton Co. Bank*, 2 Wall. 256; *Brahm v. Adkins*, 77 Ill. 263; *U. S. v. Denicke*, 35 Fed. Rep. 407; *Comm. v. McCarthy*, 145 Mass. 575; *Prehm v. State*, 22 Neb. 673; *Lancaster v. State*, 9 Tex. App. 393; *Grummond v. State*, 10 Ohio, 510; *State v. Handy*, 20 Me. 81; *Coleman v. State*, 21 Tex. App. 520; *Loyd v. State*, 22 id. 646; *State v. Clark*, 23 N. H. 429; *State v. Ryan*, 4 McCord, 16; *Comm. v. Butcher*, 4 Gratt. 544; *State v. Miller*, 93 N. C. 511; *Jackson v. State*, 55 Wis. 589; *State v. Langley*, 34 N. H. 529; *Statum v. State*, 9 Tex. App. 274; *Morgan v. State*, 61 Ind. 447; *State v. Jackson*, 30 Me. 29.

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For the defendant in error there was a brief by *Jared Thompson, Jr.*, attorney, and *Leopold Hammel*, of counsel, and oral argument by *Mr. Thompson*, *Mr. Hammel*, and *Mr. R. M. La Follette.*

ORTON, C. J. A great many errors are assigned for the reversal of the judgment of conviction in this case, and they have been urged before this court by the learned counsel of the plaintiff in error, and defended by the learned counsel of the defendant in error, with great zeal and ability. Having arrived at the conclusion that one of the errors assigned is fatal to the conviction, and perhaps also to the information, it becomes unnecessary to consider the others. But the question whether the judge of the Fifth judicial circuit was properly called into the municipal court to try the case is important as one of jurisdiction, and ought to be set at rest in view of other like cases. We therefore thought it our duty to decide it. We have arrived at a decision of this question with some hesitation and doubt. We are greatly aided, however, by the decision of this court in the case of *State v. Hirth*, 67 Wis. 368, which settled the law on the question up to that time.

1. In that case it was held that, in case of the application for a change of venue in the same municipal court on account of the prejudice of the judge, in lieu of awarding such change, the court might make an order requesting the circuit judge of an adjoining circuit to hold the court where the action is pending for the trial thereof, by virtue of ch. 218, Laws of 1883, which makes such a provision in respect to change of venue in criminal cases pending "*in any court of record*" of any county in the state. Since then, however, ch. 435, Laws of 1887, has been enacted, which provides that in such a case pending in any circuit court the judge of said court may retain the case, and call upon any other circuit judge to attend and hold said court and

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try the case. Sec. 2500, R. S., as amended by sec. 2, ch. 256, Laws of 1879, provides that the general provisions of law relative to circuit courts in cases of crimes and misdemeanors shall be in force in the municipal court of Milwaukee county, so far as applicable. In *Riemel v. State*, 71 Wis. 444, it was held that by virtue of this last act ch. 354, Laws of 1887, which authorized circuit judges in their discretion to appoint counsel to assist the district attorney in the prosecution of those charged with crime punishable by imprisonment in the state prison, was applicable to the municipal court of Milwaukee county. By this authority we may well hold that by virtue of sec. 2500, R. S., so amended, said ch. 435, Laws of 1887, which gives circuit judges the power to call upon any other circuit judge to attend and hold his court in such case, is made applicable to the municipal court of Milwaukee county. We have only stated the effect of these statutes, but we think correctly. This would seem to be conclusive of the question. We are therefore inclined to hold that the calling on Judge CLEMENTSON of the Fifth judicial circuit by the judge of the municipal court of Milwaukee county to hold said court for the trial of this case was legal and proper. But the statutes in relation to this matter are in such confusion, if not contradictory, that there is not such certainty as there should be on a question of jurisdiction. The attention of the legislature should be called to this confused and doubtful state of the law on this important subject, that they may make the law certain on the subject.

2. The fatal error in this case is the want of any evidence to sustain the charge in the information. The charge in the information is that *John B. Koetting*, as cashier and an officer of the South Side Savings Bank of the city of Milwaukee, on the 21st day of July, 1893, unlawfully, feloniously, and fraudulently did accept and receive in, into, and for, on account, and in the name of, said bank, *on deposit*

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and for safe-keeping, of and from one Charles B. Fritsch, two hundred and fifteen dollars, when he knew or had good reason to know that said bank was unsafe or insolvent. This is the substance of the charge, but the words in italics are exact. The language of the statute (sec. 4541, R. S.) is as follows: "Shall accept or receive on deposit, or for safe-keeping, or to loan, from any person, any money," etc. The offense consists of any one of three acts: First, to accept or receive, *on deposit*, any money, etc.; second, to accept or receive, *for safe-keeping*, any money, etc.; third, to accept or receive, *to loan*, any money, etc. These provisions relate to money "and to bills, notes, and other paper circulating as money." The other part of the section relates to notes, drafts, bills of exchange, bank checks, and other commercial paper. To accept or receive any of these into the bank for *safe-keeping* or for *collection*, knowing the bank to be unsafe or insolvent, is also made a crime, but these are immaterial to this information. The only argument of the learned district attorney to sustain the conviction on the evidence is that the information charges two acts: First, a deposit of money only and simply; second, a deposit of money for safe-keeping; and that the first was sustained by evidence. In charging two distinct acts, each of which constitutes the crime, each one should be separately charged by the use of all the words essential to constitute the crime. Here there is only one act charged,— one deposit of money, and that one is for safe-keeping. The words "for safe-keeping" clearly qualify the word "*deposit*" as the character or purpose of the deposit. When several acts are charged conjunctively, they constitute but one offense. *State v. Bielby*, 21 Wis. 204. To charge that the defendant aided in the escape of J. and R. is one offense. *Oleson v. State*, 20 Wis. 58. All the facts which constitute the offense must be stated with precision. *Fink v. Milwaukee*, 17 Wis. 26. "A special deposit is where the whole contract is that

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the thing shall be 'safely kept' and the identical thing returned to the depositor." "A deposit is presumed to be general." "A deposit is general, unless expressly made special or specific." 1 Morse, Banks, §§ 183–186. When the deposit is a general one, the bank has the right to mingle the money deposited with its own, and treat it as a debt due the depositor. The distinction between a general and special deposit is manifest and material. The same deposit could not be both general and special, and here there is but one deposit and one kind of deposit, and that was special, because it was for safe-keeping, as that is the definition of a special deposit. The offense should be described with such certainty and exactness that the accused may know what the offense is, and prepare to meet it, and that his conviction may be a bar to another prosecution for the same offense. It is quite clear that the offense charged in the information is of having received the money into the bank on deposit for safe-keeping, and that there is no other offense described or charged.

It seems to be conceded that there was no evidence whatever to prove the offense so described in the information. The court was requested by the defendant's counsel, on the conclusion of the testimony, to direct a verdict of not guilty, upon the ground that there was no evidence whatever of the specific offense contained in the information. The court refused this request. This was error. In *Jackson v. State*, 55 Wis. 589, there was no evidence in a case of burglary that William Drake was the owner of the dwelling house as charged in the information, and the judgment was reversed for that reason. Chief Justice COLE said in the opinion that "there was no variance, strictly speaking, but the proof did not go far enough to show that the dwelling was that of William Drake." So here the proof did not go far enough to show that the money was received

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into the bank on deposit "for safe-keeping," or as a *special* deposit. There was a general deposit proved, and no other. There was an utter failure to prove the offense as charged in the information. The kind and character of the deposit as alleged in the information, as for safe-keeping or as a special deposit, must be proved as laid. These words were material as words of necessary description of the offense,—as the ownership of the dwelling in *Jackson v. State*, *supra*; or as the sale of one glass of *whisky*, instead of one glass of *beer*, in *State v. Quinlan*, 40 Minn. 55; or as issuing fraudulent warehouse receipts to the "Merchants' Loan and Trust Company," instead of the "Merchants' Savings, Loan and Trust Company," in *Sykes v. People*, 132 Ill. 32; or as receiving money for account of "G. H. P.," instead of "G. H. P. & Co.," in *Polkinghorne v. State*, (Miss.) 7 So. Rep. 347; or as selling "spirituous and intoxicating" liquors, they must be proved to be both spirituous and intoxicating, if so charged, in *Comm. v. Grey*, 2 Gray, 501; 1 Bish. Crim. Proc. § 336; or as the ownership of the property burned, in the crime of arson, in *McGary v. People*, 45 N. Y. 153; and as in many other cases cited in the brief of the counsel of the plaintiff in error. This is such a self-evident proposition, it would have been sufficient to cite only *Prehm v. State*, 22 Neb. 673, where the court said: "It is well settled that the descriptive averments in an indictment must be proved as alleged, in order to warrant a conviction. *In support of this no authorities need be cited.*" It is held in that case that proof of *drafts* payable in goods did not support the allegation of falsely representing worthless *drafts* to be good and valuable.

By the Court.— The judgment of the municipal court is reversed, and the cause remanded for a new trial. The sheriff of Milwaukee county will take and hold the prisoner in custody for further proceedings according to law.

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CASSODAY, J. I agree with the chief justice in holding that the trial court had jurisdiction. I also concur in the suggestion that the coming legislature should make the statute so plain that in future no possible doubt can arise in the matter of calling in another judge.

The statute declares, in effect, that any person, as officer, principal, agent, or otherwise, engaged in the business of banking, "who shall *accept or receive* on deposit, or for safe-keeping, or to loan, from any person, any money . . . when he knows, or has good reason to know, that such bank, company or corporation, or that such person, is unsafe or insolvent, shall be punished by imprisonment," etc. R. S. sec. 4541. The validity of that section, and the construction of it to some extent, was considered by this court in *Baker v. State*, 54 Wis. 368. The thing sought to be punished by the statute, as it seems to me, is the accepting or receiving money by a person so engaged in the business of banking, when he knows, or has good reason to know, that such bank or banker is unsafe or insolvent. Ordinarily the money so accepted or received by such bank or banker is accepted or received on deposit. In order to make the section broad enough to cover every case where money is so accepted or received by a person so engaged in the business of banking, when he knows, or has good reason to know, that such bank or banker is unsafe or insolvent, there were added to the words "on deposit" the words "or for safe-keeping, or to loan," as stated. The purpose of the section, therefore, seems to be to punish every person engaged in the business of banking who, knowing or having good reason to know that such bank or banker is unsafe or insolvent, nevertheless accepts or receives money in such business, either "on deposit, or for safe-keeping, or to loan." These three purposes accompanying such acceptance or receipt of money would seem to be sufficiently broad and general to include every purpose for which the

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bank or banker could "accept or receive" money. It is such acceptance or such receipt of money, under the circumstances named, that is so made punishable, regardless as to which of the three purposes named attended the transaction. In other words, the fact as to whether the plaintiff in error accepted or received the money "on deposit, or for safe-keeping, or to loan" is immaterial, since the offense of accepting and receiving is complete, and the punishment the same, whether the money is received for the one purpose or the other. The particular purpose for which the money is so accepted or received does not constitute the crime made punishable, and hence the alleging of the one purpose instead of another is not descriptive of the crime. The crime was complete on his accepting and receiving the money, and therefore, it seems to me, the accused should not have a new trial merely because the state failed to allege that the money was accepted and received on deposit, or failed to prove the money was deposited for safe-keeping merely. The allegation here is, in effect, that he accepted and received the money "on deposit and for safe-keeping." Had the information alleged that he accepted and received the money *on deposit and for safe-keeping and to loan*, then, we apprehend, the evidence would have sustained the conviction, for this court has repeatedly held that "where a statute makes it a crime to do this or that or the other, mentioning several things *disjunctively*, all of which are punished alike, it is a general rule that the whole may be charged *conjunctively* in a single count, as constituting but a single offense; in which case there can be but one conviction and one punishment, as for one offense." *Clifford v. State*, 29 Wis. 329, citing and following *State v. Bielby*, 21 Wis. 204. To the same effect, *State v. Gummer*, 22 Wis. 422; *Boldt v. State*, 72 Wis. 13; *Fahnestock v. State*, 102 Ind. 158; *Hobbs v. State*, 133 Ind. 406. The mere fact that the information in the case at bar omits the words

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"and to loan" does not change the nature of the information, nor make it objectionable, nor render the evidence insufficient to support the conviction. *Ibid.* To my mind the evidence is sufficient to sustain the verdict, and the objection to it is purely technical and should not work a reversal. For these reasons I am forced to dissent.

WINSLOW, J. I concur in the reversal of the judgment on the second ground discussed in the opinion, namely, that the plaintiff in error was charged with one crime, and convicted of an entirely different crime. I further think that when, upon the filing of an affidavit of prejudice, a circuit judge is called in to try a criminal case in the municipal court of Milwaukee county, only the judge of an adjoining circuit can be called in, as provided by ch. 218, Laws of 1883 (S. & B. Ann. Stats. sec. 4686*a*). This act applies by its very terms to the municipal court, while ch. 435, Laws of 1887 (S. & B. Ann. Stats. sec. 2624*a*), by its language, applies to circuit courts alone. By a familiar rule of construction, I think this latter act has not affected the former act so far as it relates to municipal courts. Therefore it seems to me that Judge CLEMENTSON had no authority or jurisdiction to try this case.

PINNEY, J. I concur in the judgment of reversal in this cause upon the second point discussed in the opinion of the court.

NEWMAN, J. I concur in the opinion of Mr. Justice CASSODAY.

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THE STATE EX REL. LEDERER VS. THE INTER-NATIONAL INVESTMENT COMPANY.

October 9 — October 23, 1894.

Corporations: For what purposes may be formed: Construction of statutes: Action to annul: Who may maintain.

1. A corporation whose primary object is without statutory authority can have no legal existence, even though among of its declared purposes are some for the promotion of which the law permits corporations to be formed.
2. Thus, a corporation whose primary object is to obtain money from its members is *held* to be unauthorized, although its purposes, as declared in its articles of incorporation, are "to encourage frugality and economy in its members; to create, husband, and distribute funds from monthly instalments, dues, or investments from its members; to purchase, take, hold, sell, convey, lease, rent, and mortgage real estate and personal property; to loan surplus accumulations; and to carry on and conduct a general investment business."
3. Sec. 1771, R. S., authorizes the formation of corporations for certain designated purposes, "or for any lawful business or purpose whatever, except," etc. *Held*, that these general words extend only to things of a nature kindred to those specifically mentioned.

[4. Whether a mere *resident* of the state can, under sec. 3241, R. S., maintain an action to annul the existence of a corporation, not determined.]

ACTION to annul the existence of a corporation, under sec. 3241, R. S.

The defendant appears to have been incorporated July 7, 1893; and its original articles of organization and incorporation were amended December 8, 1893, so as to contain, among other things, in substance and effect, the duties and salaries of each and every of the several officers, directors, and agents of the company; that the business of said corporation shall be to encourage frugality and economy in its members, to create, husband, and distribute funds from monthly instalments, dues, or investments from its mem-

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bers, to purchase, take, hold, sell, convey, lease, rent, and mortgage real estate and personal property, to loan surplus accumulations, and to carry on and conduct a general investment business; that said corporation shall have no capital stock, but shall be composed of incorporators and members, who shall be admitted in the manner therein particularly defined; that said corporation shall issue incorporators' shares, originally, only to the persons who signed the original articles of incorporation, and to such other persons as the said incorporators or their assigns shall nominate: provided, however, that not to exceed twelve incorporators' shares shall be issued, one to each; that contracts of membership, in such form as said rules prescribe, shall be entered into only with persons who become members of the corporation, but one person may hold and own any number of such contracts, and the same may be assigned as provided in said rules; that for the failure or neglect to pay monthly instalments promptly as they mature, fines shall be imposed, and forfeitures declared and enforced, in the sums and in the manner as the said rules provide, and other methods and conditions upon which members shall be accepted, discharged, or expelled shall be such as are created and prescribed by the said rules; but no person except those holding incorporators' shares shall be a member of the corporation unless he holds a contract of membership therein, but every person holding a contract of membership shall be a member thereof; that not less than four contracts of membership shall issue upon any single application.

The contract of membership is prescribed in the rules which are made a part of the articles, and among other things contains in effect the following: That for and in consideration of a membership fee of $5, and the promise and agreements of the second party herein expressed, the first party doth hereby grant unto the second party, his

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heirs, representatives, and assigns, so long as he and they shall keep the said promises and agreements, but not longer, all the rights and benefits provided by the articles of organization and rules of the company; and the second party therein promises and agrees to pay unto the company each month, from the date thereof until the contract is retired or forfeited, the sum of $2, and also agrees to comply with all the requirements of the rules of the company; that if he keeps his agreements therein contained, but not otherwise, then, in consideration of the premises, the company will pay to him, his heirs, executors, administrators, or assigns, out of the reserve fund (referred to in the rules) accumulated for that purpose, on or before forty-three years from and after the date hereof, the sum of $1,000, provided that this contract is then in force, and has not been reached and paid under the further provisions hereof; *or* the company doth further agree that, if the holder hereof shall well and truly keep his said agreement, this company will pay to him, his heirs, executors, administrators, or assigns, out of the members' trust fund (referred to in the rules) accumulated for that purpose, when there shall be sufficient money in that fund therefor, and when this contract is reached in its order of payment, and not before, the sum of $1,000, subject, however, to discount pursuant to the provisions of article 14 of the rules: provided, however, that this contract has not then been paid pursuant to the first foregoing provision thereof; that if the second party shall fail to pay any instalment within the time specified by the rules, or if he shall fail to obey and observe the said rules, this company shall have the right to cancel and revoke this contract and terminate this membership, without notice, proceeding, or process.

The rules further provide that every person desiring to become a member shall make written application for the number of contracts he desires, not less than four, and shall

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accompany his application with a membership fee of $5 for each contract applied for, but the company shall have the right to reject any application upon the return of the membership fee; that upon receipt of such application this company shall immediately return to such applicant a statement showing the numbers of the contracts that will issue upon the application, and, if the applicant shall in writing agree to accept the contracts bearing the numbers so designated, the contract of membership shall be deemed complete; but, if he shall refuse to accept such contracts, he shall immediately notify the company in writing, at its home office, of his refusal, and his membership fee shall be returned to him, and his application canceled; that contracts issued shall bear the numbers agreed upon, and the holder shall pay unto this company, at its home office, unless otherwise ordered by the board, a monthly instalment of $2 per month upon each contract, for each successive month from date of contract until cancellation; that the contracts issued shall be numbered in the numerical order issued, and to correspond with the numbers agreed to be given in pursuance of article 7, and shall be issued only in blocks of four; that, if any member shall fail or neglect to pay any instalment within fifteen days after it matures, he shall pay a fine of fifty cents for each such instalment; and if such instalments and fines shall not be paid within fifteen days from the time when such fine was assessed, together with the instalment then maturing, the contract upon which the instalment matured and the fine was assessed shall thereupon lapse and become null and void, and all payments and instalments theretofore made thereon shall be forfeited; nor shall this company give, or be required to give, any notice of the maturity of instalments or the assessment of fines, or of forfeiture or lapse of contract.

The rules then provide that there shall be created and maintained what shall be known as a "members' trust

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fund," to which shall be applied $1 from each monthly instalment received, and all fines and transfer fees collected, and from which shall be made the payment upon contracts mentioned in article 12. Article 12 provides that, as often as there shall be in the members' trust fund the sum of $1,000, there shall be paid to the holder of one outstanding contract of membership the sum of $1,000, subject to certain conditions mentioned therein; that the first contract upon which payment shall be made shall be contract No. 1, the second payment shall be upon contract No. 4, the third payment upon contract No. 2, the fourth payment upon contract No. 8, and so on, reverting back to the first issued, unforfeited, unpaid nonmultiple contract and alternating with the lowest unpaid, unforfeited multiple of four, until like payments have been made to the holders of all issued, unforfeited, unpaid contracts; but the company shall be required to pay or make payment upon no contract until there is sufficient money in the members' trust fund therefor, nor until such contract is regularly reached in its order for payment: provided, however, that such contract has not been paid at expiration of time, or upon surrender, pursuant to the provisions of article 15. Article 14 provides that in case there shall have been less than sixty monthly instalments paid upon any contract of membership up to the time that such contract is canceled by payment, then there shall be deducted and reserved twenty per centum of the amount due upon every such contract; and article 15, after providing for a "reserve fund," provides further that whenever any contract shall mature, under the provisions for payment, forty-three years from and after the date thereof, provided it has not been paid before that time, there shall be paid to the holder thereof the sum of $1,000 from said reserve fund. It is also provided that all instalments shall be paid at the home office, unless otherwise ordered by the board, and proper receipts given; that all

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receipts shall be numbered, and duplicate stubs with duplicate numbers to correspond with the receipt numbers shall be kept in the office.

The attorney general, on application to him as prescribed by secs. 3240, 3241, R. S., refused to bring an action to vacate said charter and annul said corporation, and so the relator was allowed to file his petition in this court, setting forth said articles of incorporation and organization in full, and alleging in effect that the business of the alleged corporation is illegal for the reasons that it has in it the element of chance and uncertainty and is in violation of the statutes against lotteries; that its manner of doing business is intended to deceive persons becoming members thereof; and that its business is illegal and contrary to law, and a common and public fraud.

The defendant answered said petition by way of admissions and denials, and among other things alleged, in effect, that the defendant has about 500 members and contract holders, and a large number of agents soliciting persons to become members; that it has not yet paid a contract of membership for the reason that it has not continued business long enough, nor extensive enough, for that purpose.

To such answer the relator demurred, on the ground that the same does not state facts sufficient to constitute a defense.

Hugh Ryan, for the plaintiff.

David S. Rose, for the defendant.

CASSODAY, J. There is really no dispute in the facts. The jugglery with figures provided for in the articles of incorporation, and mentioned in the foregoing statement, may be such as to make the rights of contract holders a matter of so much uncertainty and chance as to bring the defendant under the condemnation of the statutes against lotteries and gambling, as contended by counsel for the

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relator. *Comm. v. Wright*, 137 Mass. 250; *Wilkinson v. Gill*, 74 N. Y. 63. But the view we have taken of the case makes it unnecessary to determine that question.

Of course, there can be no valid incorporation without legislative authority. As will be observed in the foregoing statement, the charter declares, in effect, that the business of the corporation "shall be to encourage frugality and economy in its members; to create, husband, and distribute funds from monthly instalments, dues, or investments from its members; to purchase, take, hold, sell, convey, lease, rent, and mortgage real estate and personal property; to loan surplus accumulations; and to carry on and conduct a general investment business." But we find nothing in the articles of incorporation "to encourage frugality and economy in its members." Besides, we find no statute authorizing an incorporation for any such purpose. The same is true in regard to creating, husbanding, and distributing funds from monthly instalments, dues, or investments from its members, as mentioned. The only statutory authority relied upon is sec. 1771, R. S., as amended. This statute does authorize the formation of a corporation "for buying, selling, exchanging and dealing in all kinds of property, real or personal, or both;" but it is manifest, from the articles of incorporation before us, that the buying, holding, leasing, and selling property is not the primary object of this corporation. On the contrary, its primary and most important object is to obtain moneys from its members, and its incidental or secondary object is the disposal of the moneys after they are so obtained. If, therefore, the general scheme for obtaining the moneys is without statutory authority, then the corporation has no legal existence. So, the statute authorizes the formation of a corporation "for loaning money on securities or otherwise." But "to loan surplus accumulations, and to carry on and conduct a general investment business," is

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not the primary object of this corporation. On the contrary and as already observed, its primary object is to first obtain the moneys from its members, and its incidental or secondary object is to dispose of moneys so obtained. If, therefore, such primary object is without statutory authority, then the whole scheme must fail. Counsel for the defendant was asked on the argument to state the real business of this corporation, and he answered that it was "a species of philanthropy." But there is nothing in the articles of incorporation to justify the conclusion that its purpose is to do good or bestow benefits upon its members,—much less upon mankind in general. If it is designed to confer favors upon any persons, it must be its officers and managers. Besides, the section of the statute cited does not authorize the formation of a corporation for such philanthropy. The nearest approach to it is the authority to form a corporation "for the establishment and maintenance of any benevolent, charitable or medical institution, hospital or asylum." Of course, there was no authority to form this corporation under that clause.

Counsel does not claim that this corporation belongs to any of the classes of corporations specifically authorized by the section, but he contends that the formation of such a corporation is authorized by the general clause following the several specific classes mentioned, to wit, "*or for any lawful business or purpose whatever*, except" as therein stated. But, by a well-settled rule of construction, these general words extend only to things of a kindred nature to those specifically authorized by the section. *Noscitur a sociis. Wisconsin Telephone Co. v. Oshkosh*, 62 Wis. 38. That rule has been repeatedly applied by this court to numerous statutes where general words have followed specific authority. *Bevitt v. Crandall*, 19 Wis. 583; *Edson v. Hayden*, 20 Wis. 684; *Morse v. Buffalo F. & M. Ins. Co.* 30 Wis. 534; *Attorney General v. Railroad Cos.* 35 Wis.

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519; *Campbell v. Campbell*, 37 Wis. 218; *Sawyer v. Dodge Co. Mut. Ins. Co.* 37 Wis. 503; *Cleaver v. Cleaver*, 39 Wis. 102; *Gibson v. Gibson*, 43 Wis. 33; *Kelley v. Madison*, 43 Wis. 645; *Wis. Cent. R. Co. v. Smith*, 52 Wis. 144; *Blake v. Blake*, 75 Wis. 343. Any other construction would enable parties, by mere agreement, to form a corporation for any conceivable "business or purpose whatever," not in violation of law. Certainly the legislature never intended to grant such unlimited authority.

It does not appear that the relator is an elector, citizen, or tax-payer of the state, nor that he is a member of, or in any way interested in, this corporation. It is merely alleged that he is a "resident" of the city and county of Milwaukee. It may be a serious question whether a mere private person who happens to reside in the state can, as relator, maintain such an action. *State ex rel. Cornish v. Tuttle*, 53 Wis. 45. But no such objection has been made. The question of the authority to form such corporation is so important that we deem it our duty to decide it.

By the Court.— The demurrer to the answer is sustained, and judgment is hereby directed, vacating, dissolving, and annulling the corporate existence of the defendant, and ousting it of its franchises.

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PELITIER, by guardian *ad litem*, Appellant, vs. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY and another, Respondents.

September 6 — November 13, 1894.

Railroads: Injury to child on track: Instructions to jury: Preponderance of evidence: Proximate cause.

1. A charge that the jury must be satisfied by the preponderance of the evidence, to a reasonable certainty, that a fact existed, before they could find such fact, was not erroneous. *Telford v. Frost*, 76 Wis. 172, distinguished.
2. In an action for personal injuries it was not error to charge that if the negligence of defendant's servants was not the proximate cause of the injury it would be robbery, under the forms of law, to compel it to respond in damages.
3. In an action for personal injuries to a child who was run over by cars which were being backed, without warning, at a place where people were accustomed to cross defendant's railroad track, after the jury had been fully instructed as to the duty of defendant to keep a lookout in such places, the omission of any reference to the want of a lookout, in giving an illustration of the meaning of the term "proximate cause," was not error, where the jury were afterwards told that it was for them to consider whether, by the exercise of ordinary care, the trainmen might have known that the child was on or near the track,— it being thus plainly left to the jury to determine whether a proper lookout would have avoided the accident.

APPEAL from the Circuit Court for *Douglas* County.

This is an action to recover for personal injuries. The defendant operates a railroad track on what is known as Connor's Point, near the city of Superior. This track runs northwest and southeast, parallel with the southwest shore of Superior bay. The right of way on which defendant's track runs is twenty-five feet wide, and the northeast line thereof is about fifty feet from the shore line of the bay. Immediately joining and on the southwest of the defendant's right of way is the right of way of the Northern

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Pacific railway, which is forty feet wide, and also has a railroad track upon it. Both of these tracks are transfer tracks, not used for train service, but for switching, storing, and transferring cars from one road to the other. The defendant's right of way is not fenced. Several small houses stand upon the strip of shore between the defendant's right of way and Superior bay, which have been built and are occupied by squatters. The occupants of these houses have no outlet to stores or schools save across defendant's railway tracks, and the tracks were continually used by numbers of people for that purpose. In one of these houses, in December, 1890, lived Francis Pelitier, Sr., with his wife and two children, one of them being the plaintiff, who was at that time two years and nine months old. One St. Peter lived in another of these houses on the strip of beach, at a distance of 100 feet or so from Pelitier's house. Both houses were built on posts, and stood fronting the railway track of the defendant, the front being about one foot outside of the right of way. Over the front door of St. Peter's house was a stormhouse, four feet wide, most of which stood within defendant's right of way. Defendant's track stands nearly nine feet above the water of the bay, and about two feet above the floors of the houses, the track being upon an embankment made of old ties and dirt.

On the afternoon of December 16, 1890, the plaintiff's mother made a visit at Mrs. St. Peter's house, taking with her the plaintiff and an infant eighteen months of age. At the time she went to Mrs. St. Peter's house, there were fifteen to twenty freight cars standing on defendant's track, apparently coupled together, the north end of the train being in front of the St. Peter house. One or two other freight cars stood further to the north, separated a few feet from the first-mentioned train of cars. All of the cars had been standing there for some hours. Mrs. Pelitier stayed at Mrs. St. Peter's house perhaps two hours, and

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some time between 3 and 4 P. M. went home to unlock the door and build the fire, and left her children at Mrs. St. Peter's house. In a few minutes she came back to get the children. When she came out of the St. Peter house the second time, she was carrying the baby, and plaintiff walked behind her, and Mrs. St. Peter also went out on a platform in front of the house. The edge of this platform was about four feet from the railroad track, and two feet below it. While the women were standing on the platform, Mrs. Pelitier missed the plaintiff, and asked Mrs. St. Peter where he was. Mrs. St. Peter looked, and saw him under a coal car right in front of her house, being one of the fifteen or twenty cars first mentioned. The cars were not then moving, but they saw that the engine was attached to the southeast end of the train. According to Mrs. St. Peter's evidence, the boy got across the track, went a few steps towards the Northern Pacific track, and then returned, and, while trying to recross the defendant's track, was run over by the train, which was just then backing a few feet in order to couple on the detached cars. The boy lost one foot and one hand. No whistle or bell was sounded. The evidence of Mrs. St. Peter was apparently that the plaintiff was trying to cross the track at the opening between the train and the detached cars when he was run over; but the evidence of the trainmen was to the effect that he was run over three or four car lengths from the end of the train; hence that he must necessarily have been crawling under or between cars in the train.

A special verdict was returned by the jury, in which they found, in answer to appropriate questions, (1) that the defendant, before the accident, sanctioned the practice of persons living near its track using such track to travel on at the place where the accident happened; (2) that the trainmen, in the exercise of ordinary care, ought to have anticipated that a child might probably be upon the track in the immediate vicinity of the cars where the accident occurred,

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when they caused the cars to be moved back; (3) that the trainmen failed to exercise ordinary care when they moved the cars back at the time of the accident; (4) that such failure to exercise ordinary care was not the proximate cause of the injury; (5) that the railroad track, where the boy entered thereon, was sufficiently protected without a fence to prevent cattle and other domestic animals from straying upon such tracks; (6) that there was want of ordinary care on the part of the boy's mother that contributed to produce the injury complained of. On this special verdict, judgment was entered for the defendants, and from such judgment the plaintiff appeals.

For the appellant there was a brief by *John Brennan* and *B. F. Hutchins*, and oral argument by *Mr. Brennan* and *R. M. Bashford*. They contended, *inter alia*, that the instruction that the jury must be satisfied to a reasonable certainty that a fact existed before they could find such fact, required too much, a mere preponderance of the evidence being sufficient. *Telford v. Frost*, 76 Wis. 172; *Whitney v. Clifford*, 57 id. 158; *Washington Union Ins. Co. v. Wilson*, 7 id. 169; *Blaeser v. M. M. Mut. Ins. Co.* 37 id. 38; *Quaife v. C. & N. W. R. Co.* 48 id. 520; *Wright v. Hardy*, 22 id. 356; *Mo. Pac. R. Co. v. Bartlett*, 81 Tex. 42; *Allen v. Murray*, 87 Wis. 41; *Mitchell v. Hindman*, 150 Ill. 538; *Comm. v. Webster*, 5 Cush. 314; *Comm. v. Costly*, 118 Mass. 1; *Sullivan v. State*, 52 Ind. 309; 3 Greenl. Ev. § 29, note 2.

For the respondents there was a brief by *Catlin & Butler* and *Carl C. Pope*, attorneys, and *Thomas Wilson* and *S. L. Perrin*, of counsel, and a supplemental brief by *Mr. Wilson*, and the cause was argued orally by *Mr. Pope* and *Mr. Wilson*.

The following opinion was filed October 2, 1894:

WINSLOW, J. The grounds of negligence claimed by the plaintiff were failure to fence the right of way and failure

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to give signals of the movement of the cars, as well as failure to keep a proper lookout. The verdict of the jury establishes the fact, in answer to the first three questions, that the train was negligently moved when the plaintiff was injured; but in response to the fourth question it was found that such negligence was not the proximate cause of the injury. There is nothing inconsistent with this fourth finding elsewhere in the verdict, nor is it claimed that any material fact in controversy was not submitted to the jury; hence it is very clear that if this fourth finding is founded upon sufficient evidence, and no error was committed by the trial court in its submission to the jury, the plaintiff cannot recover. To this question, therefore, we shall address ourselves.

There was but one error claimed in the admission and rejection of evidence, and as that alleged error related solely to evidence bearing on the first three questions, and could have no possible bearing on the answer to the fourth question, it is unnecessary to consider it.

The instructions applicable to the fourth question and to which plaintiff excepted will be given at length. After instructing the jury that the burden of proof with reference to certain questions was on the plaintiff, the court said:

"You are instructed that it is incumbent on the party upon whom the burden of proof rests to establish the existence of a fact in controversy, to satisfy you by a preponderance of evidence that such fact does exist; otherwise, you should find to the contrary. That is to say, you should carefully weigh all the evidence produced by both parties bearing on any such controversy, and determine upon which side such evidence preponderates, if you can. If the same is so evenly balanced that you cannot determine on which side the same preponderates, or if you conclude that the preponderance of evidence is against the party on whom the burden of proof rests, or if, notwith-

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standing there is to your minds a preponderance of evidence tending to establish a fact in controversy, you are yet not satisfied of its existence, your finding should be against the party on whom the burden of proof rests. Such finding should be in favor of the side on which the burden of proof rests only when you are satisfied that the preponderance of evidence in respect to the controversy tends to establish the existence of the fact involved, and you are satisfied to a reasonable certainty that the fact does exist which such preponderance of evidence tends to establish. You are further instructed that the term 'preponderance of evidence,' as here used, does not necessarily mean the greatest number of witnesses. It frequently happens that there are more witnesses on one side of a controversy than on the other, yet the greatest weight of evidence be on the side of the lesser number of witnesses; and in all such cases it is the weight of evidence that counts and should govern the finding of a jury. Keep in mind what is here said in regard to the degree of certainty to which you should arrive in respect to the existence of a fact in controversy in order to warrant a finding in favor of the party on whom the burden of proof rests, and the explanation of the term 'preponderance of evidence,' and apply the same to each question submitted. . . .

"The fourth question, which is as follows: 'If to the third question you say "Yes," was such failure to exercise ordinary care and prudence the proximate cause of the injury complained of?' is a very important one in the case; for whatever failure of duty there may have been on the part of the trainmen, if such failure was not the proximate cause of the injury, then such injury cannot be attributed, in a legal sense, to any failure of duty on the part of the railway company; and to make it respond in damages to the injured party would, under such circumstances, be robbery, under the forms of law. Generally speaking, as the

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term 'proximate cause' is used in the question, it means the first or the efficient cause, the cause acting first and directly producing the injury, or which sets other causes in motion producing such injury; there being an intimate and close causal connection between such first cause and the final result. In either case such producing cause is held to reach to the injury, and to be, in a legal sense, proximate to it; but you are instructed in this connection that, in order that want of ordinary care on the part of the trainmen may be found to be the proximate cause of the injury, it is not enough to show, and for the jury to find, that such injury was a consequence of their acts; but, to warrant such finding, it must appear to your satisfaction, from a preponderance of evidence, that it might reasonably have been expected by such trainmen, in the exercise of ordinary care as men of intelligence having the knowledge that they may be reasonably expected and ought to have had in doing such work, that such accident might probably result from their conduct. If you do not find such to be the fact, or if you find, under all the circumstances, that, though the trainmen had exercised ordinary care, the accident would probably have happened just the same, then you cannot say that want of ordinary care on the part of such trainmen was the proximate cause of the accident. To illustrate: If the trainmen, in the exercise of ordinary care, before moving the cars should have blown the whistle and rung the engine bell, and they omitted so to do, yet the child was so young that he probably would not have understood such signal and retired out of the range of danger, and the person in charge of the child would not, in the exercise of ordinary care, have had time to have rescued the child from the place of danger before the car struck him, or have kept him out of such danger, and you so find the fact from the evidence, then you cannot say that want of ordinary care on the part of the trainmen in omitting such signal was the proximate cause of the injury. Bear in mind,

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in considering this question, that there is no evidence to show that the trainmen knew the child was on the track or near it; but whether they might have known such fact by the exercise of ordinary care, and omitted to exercise such care, is for your consideration."

The errors which appellant claims in these instructions will be considered in their order.

1. It is claimed that it was error to say that the jury must be satisfied by the preponderance of the evidence, to a reasonable certainty, that a fact existed, before they could could find such fact; and it is said that this expression means practically the same as the expression "satisfied beyond a reasonable doubt." The expression used by the court was criticised in *Allen v. Murray*, 87 Wis. 41, but it did not become necessary to pass upon it in that case. We have examined the question, and are satisfied that the instruction is not erroneous. In the case of *Beery v. C. & N. W. R. Co.* 73 Wis. 197, an instruction that the jury must feel "reasonably certain" of a fact on which plaintiff's case depended was held correct; and it was said that this did not mean that the proof must be clear and most satisfactory, but only that "the preponderance of the evidence must convince their judgment of the truth of the fact found." In *Gores v. Graff*, 77 Wis. 174, an instruction to the effect that there need only be "a fair preponderance of the evidence tending to show the existence of a fact," was distinctly disapproved; and it was held that the instruction should have been that, "if the jury were *satisfied* by a preponderance of the evidence that all the facts essential to a recovery were proved, they should find for the plaintiff." The instruction in question here seems to be entirely justified by the doctrines laid down in these two cases. It is very pertinently said by Mr. Justice LYON in the last-named case that "there may have been a preponderance of evidence tending to prove such facts, or some or all of them, and yet the evidence be quite insufficient to

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prove those facts." A verdict in favor of the party who has the burden of proof in any case is a solemn determination that certain facts exist. Should such a determination be made merely because the evidence upon one side is a trifle weightier than that upon the other, when the evidence is so unsatisfactory that the judgment of the jury is not satisfied nor the reason convinced of the existence of the facts? We think not. The expression frequently used by the trial courts and frequently announced by appellate courts is that the minds of the jury must be satisfied or convinced by the preponderance of the evidence of the existence of a fact. *Whitney v. Clifford*, 57 Wis. 156. When the mind is satisfied or convinced of the existence of a fact, is not the mind reasonably certain of the fact? It seems to us that this question must be answered in the affirmative. Expressions may be found in text-books and decisions to the effect that a mere preponderance of the evidence is all that is required in civil cases, but it will be found that this principle is generally laid down in contradistinction to the rule of proof in criminal cases. *Whitney v. Clifford, supra.* In a general way this statement of the rule is correct, but that does not make the amplification of the rule as given in this case incorrect. *Telford v. Frost*, 76 Wis. 172, was much relied on by appellant, but examination of the case clearly shows that the question here raised was not there presented. The only question there presented was as to the correctness of the general charge that the verdict must be in accord with the greater weight of evidence, and no request was made to charge the jury more specifically. Upon principle and authority, therefore, we hold that the charge of the court upon this subject, though expressed more strongly and emphatically than is usual or perhaps advisable, was not error.

2. It is claimed that it was error for the trial court to charge the jury that, if the negligence of defendant's serv-

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ants was not the proximate cause of the injury, it would be robbery, under the forms of law, to compel it to respond in damages to the injured party. We perceive no error in this statement. This cannot be fairly understood as an intimation that the plaintiff is seeking to rob the defendant, but rather as a timely caution to the jury in a case where human sympathy would naturally tend to lead the judgment astray.

3. It is claimed that there was error in the definition of proximate cause. The only error pointed out is that in the illustration given to the jury the element of the want of a lookout on top of the car is left out. The jury had been previously fully and correctly charged, in connection with the third question, as to the duty of the company to keep a lookout in such a place as the one in question. The remarks excepted to were simply by way of illustration of the meaning of the term "proximate cause," and did not purport to state the whole case. Furthermore, the instruction closes with the caution that the question whether the trainmen might have known that the child was on or near the track, by the exercise of ordinary care, and failed to exercise such care, is for the consideration of the jury. This plainly left to the jury the question whether a proper lookout would have avoided the accident. We see no error here.

We have reviewed the only questions which require attention as to the correctness of the fourth finding, and find no error. There was sufficient evidence upon which the jury might properly find that no signals or lookouts would have been of any avail in avoiding the accident. This renders unnecessary the discussion of the question whether the contributory negligence of the mother would defeat the plaintiff's recovery.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied November 13, 1894.

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McCABE, Respondent, vs. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Appellant.

September 7 — November 13, 1894.

Railroads: Injury to licensee: Negligence.

Plaintiff, the foreman of a gang of laborers engaged in unloading building material from freight cars on a spur track, was injured by the falling of a movable platform which had been constructed by his employers for use in the work, and which at this time was standing so near the track that it was struck and knocked down by a car of more than ordinary width which was being pushed in upon that track in the customary course of defendant's business. *Held*, that plaintiff was a mere licensee to whom defendant owed no duty of active care, and that defendant was not liable for the injury.

APPEAL from the Superior Court of *Douglas* County.

This is an action for damages for a personal injury. The plaintiff was an employee of Butler Bros., contractors and builders, acting as foreman of a gang of laborers who were engaged in unloading, from cars on defendant's track, bricks and other building materials for Butler Bros. The cars, while being unloaded, stood upon a spur track. They were moved from time to time, to accommodate the business of the defendant upon the spur track, by taking out empty cars and putting in loaded ones for Butler Bros. and its other patrons along that line. For their own convenience in unloading from the cars, Butler Bros. erected a platform near the track. It was a movable platform. Sometimes it was moved up so near to the track that only freight cars of ordinary width could pass without hitting it. Sometimes it was left standing so near the track as that. The defendant knew of this platform, and did not object to it. On one occasion it pushed a train of cars which contained a furniture car in upon this spur track. A furniture car is wider than an ordinary freight car. The platform was standing too near to the track. The furniture car struck it

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and knocked it down. The plaintiff was standing upon the platform. He knew the cars were being pushed in. His back was toward the cars. He was thrown down and upon some timbers which were under the platform, and was injured. There was a verdict and judgment for the plaintiff, from which the defendant appeals.

For the appellant there was a brief signed by *Catlin & Butler* and *Carl C. Pope*, attorneys, and *Thomas Wilson* and *S. L. Perrin*, of counsel, and a supplemental brief by *Thomas Wilson*, and oral agument by *Mr. Pope* and *Mr. Wilson*. They argued, among other things, that the defendant was running cars in the usual course of its business over its spur track, in order to place them where they could be unloaded, and omitted no duty or precaution which the law required. 2 Broom & Hadley's Comm. * 252; *Cahill v. Layton*, 57 Wis. 614; *Cole v. McKey*, 66 id. 510; *Dowd v. C., M. & St. P. R. Co.* 84 id. 116. Defendant was under no legal obligation to give signals or to provide a lookout in the direction the train was moving. *Townley v. C., M. & St. P. R. Co.* 53 Wis. 626; *Whalen v. C. & N. W. R. Co.* 75 id. 654; *Heddles v. C. & N. W. R. Co.* 74 id. 239; *Johnson v. C. & N. W. R. Co.* 56 id. 279. The plaintiff was a mere licensee and, as the trainmen of the defendant did not see him prior to the accident, they did not fail in any duty that they owed him. *Davis v. C. & N. W. R. Co.* 58 Wis. 646; *Martin v. Bishop*, 59 id. 417; *Hogan v. C., M. & St. P. R. Co.* id. 139.

For the respondent there was a brief by *Loud & O'Brien*, and oral argument by *P. O'Brien*. They contended, *inter alia*, that defendant knew that men were continually at work on and about its track where the accident occurred. It therefore owed plaintiff the duty of "keeping a careful lookout in the direction the train was moving." *Townley v. C., M. & St. P. R. Co.* 53 Wis. 626; *Delaney v. C., M. & St. P. R. Co.* 33 id. 67; *Whalen v. C. & N. W. R. Co.* 75 id. 654; *Heddles v. C. & N. W. R. Co.* 74 id. 239; *Davis v.*

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C. & N. W. R. Co. 58 id. 646; *Johnson v. L. S. T. & T. Co.* 86 id. 64; *Sutton v. N. Y. C. & H. R. R. Co.* 66 N. Y. 244; *Erickson v. St. P. & D. R. Co.* 41 Minn. 500. Plaintiff was not a mere licensee. He was rightfully on the track in the discharge of his duties to his employers, the consignees of freight shipped to them by defendant. Under the circumstances there was an implied warranty to him on the part of the company that its line and surroundings or other premises were safe in so far as care on the part of the company could make them safe, and that he should not be injured by negligence on the part of the company in the conduct of its business. Patterson, Railway Accident Law, §§ 208, 229; *Holmes v. N. E. R. Co.* L. R. 4 Exch. 254; *S. C.* 6 id. 123; *Allegheny V. R. Co. v. Findley*, 4 Weekly Notes Cas. 438; *Spotts v. Wabash W. R. Co.* 111 Mo. 380; *Foss v. C., M. & St. P. R. Co.* 33 Minn. 392; *Watson v. W., St. L. & P. R. Co.* 66 Iowa, 164; *Ill. Cent. R. Co. v. Hoffman*, 67 Ill. 287; *Newson v. N. Y. C. R. Co.* 29 N. Y. 383; *New Orleans, J. & G. N. R. Co. v. Bailey*, 40 Miss. 395; *Shelbyville L. B. R. Co. v. Lewark*, 4 Ind. 471; *Shelbyville L. B. R. Co. v. Lynch*, id. 494. In the case at bar the defendant was bound to exercise active diligence to prevent injury to the plaintiff who was lawfully on its premises about to engage in unloading its cars. This is true even if it involved a slight departure, on the part of the defendant, from running cars in the usual course of its business. *Stinson v. N. Y. C. R. Co.* 32 N. Y. 333; *Goodfellow v. B., H. & E. R. Co.* 106 Mass. 461; *Haley v. N. Y. C. & H. R. R. Co.* 7 Hun, 84; *Baltimore & O. R. Co. v. State*, 33 Md. 542; *Union Pac. R. Co. v. Harwood*, 15 Am. & Eng. R. Cas. 494.

The following opinion was filed October 2, 1894:

NEWMAN, J. The plaintiff was a mere licensee. The defendant owed him no duty of active care. The plaintiff himself was bound to the exercise of the highest care to

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shield himself from injury. He had no reason to expect that the defendant would regulate the running of its trains, or change the course of its business, to suit his purposes or convenience. He could expect from it only such consideration and ordinary care as it owes to the general public. *Cahill v. Layton*, 57 Wis. 600; *Hogan v. C., M. & St. P. R. Co.* 59 Wis. 139; *Truax v. C., St. P., M. & O. R. Co.* 83 Wis. 547; 2 Wood, Railroads, 1469, and cases cited. Butler Bros. took the permission to use the defendant's right of way in the manner in which they were using it, subject to the ordinary risk and danger which was incident to the use of the spur track by the defendant in the manner in which it was accustomed to use it. There was no implied promise on the part of the defendant to cease doing any part of its customary business in the customary manner, or that it would desist from any customary service to any of its patrons along that track. The evidence fails to show that anything was done by the defendant out of the customary course of its business along that track. The verdict is contrary to the law.

By the Court.— The judgment of the superior court is reversed, and the cause remanded for a new trial.

A motion for a rehearing was denied November 13, 1894.

WELLS, FARGO & COMPANY, Respondent, vs. WALSH, Appellant.

October 23 — November 13, 1894.

Foreign wills: How made effective as to lands in this state: Trust to pay debts: Enforcement by creditor: Jurisdiction of circuit court.

1. Under sec. 2295, R. S., where a foreign will devised lands in this state to the executrix in trust for the payment of debts, the recording of a duly authenticated copy of such will and of the probate thereof,

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in the office of the register of deeds of the county in which the lands are situated, passes the title to the trustee as effectually as if the will had been probated in the proper court in this state.

2. In such a case, where the executrix and trustee, in fraud of the creditors, has allowed the lands to be sold for taxes, and has procured the issuance of a tax deed to herself, which she claims to be a good title, a creditor may maintain an action in the circuit court to enforce the trust, notwithstanding the fact that by proceeding in the county court to have the will probated and the estate administered he might obtain some part of the relief sought; and all the creditors may be made parties to such action.

[3. Whether under sec. 3793, R. S., if there were no debts due to parties residing in this state, a foreign creditor could, in the county court, proceed further than the mere probate of the will, not determined.]

APPEAL from the Circuit Court for *Jefferson* County.

The facts are stated in the opinion.

For the appellant there were briefs by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *E. P. Vilas.*

Harlow Pease, for the respondent.

WINSLOW, J. This is an action in equity to enforce an alleged trust in favor of the plaintiff in certain lands in Jefferson county in this state. The original complaint in the action has been before this court upon demurrer, and will be found reported in 87 Wis. 67. An adequate statement of that complaint will be there found, and it need not be repeated here. It was there held that the alleged trust had never taken effect in this state, because the will by which the trust was created had never been probated in any of the courts of this state, nor had the will, with its certificate of probate in the probate court of Nevada, ever been recorded in the office of the register of deeds of Jefferson county. R. S. secs. 2295, 3790, 3793. Since that decision the complaint has been amended in several particulars. The principal amendment, and the only one which it

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is deemed necessary to state, is an allegation that on the 3d day of July, 1882, a duly authenticated copy of the will, with the certificate of the probate thereof in the state of Nevada, was duly recorded in the office of the register of deeds of Jefferson county. A demurrer to the amended complaint has been overruled, and the defendant again appeals. As will be seen by reference to the report of the former appeal, the land in question was, by the terms of this will, devised to the defendant in trust for the purpose of paying all the debts of the deceased.

The first question in the case is as to the meaning and effect of sec. 2295, R. S. 1878, which provides that when a duly authenticated copy of a foreign will, with the probate thereof in the proper court of another state, is recorded in the office of the register of deeds of any county in which land devised thereby is situated, it "shall be as valid and effectual to pass the title to such lands as if such will had been duly proved and allowed by the proper court in this state." Certainly, if Walsh had been at the time of his death a resident of Jefferson county, and this will had been duly probated in the county court of that county, the title to the lands in question would have passed, by virtue of the will and probate thereof, to the defendant, in trust for the benefit of Walsh's creditors. The words of the statute are plain and unambiguous. There is no room for construction. If they mean anything, they mean that the recording of the certified copy of a foreign will and its probate passes the title to the lands devised by the will as effectually as if the will had been probated in the proper court of Wisconsin.

It follows necessarily that the title to the lands in question is in *Mary Jane Walsh*, in trust to pay the creditors of James Walsh. The plaintiff, according to the allegations of the complaint, is, and was at the time of Walsh's death, a creditor of James Walsh, and consequently one of the

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beneficiaries of the trust. Why can it not, by action, enforce the performance of that trust, when the trustee refuses to do so? We perceive no good reason to the contrary.

But it is said that the plaintiff should proceed in the county court, because the enforcement of the trust amounts in fact to an administration of that part of Walsh's estate which is in Wisconsin. It is true that under sec. 3790, R. S., the plaintiff might procure probate of the will in the county court of Jefferson county. Whether, in this case, the plaintiff could proceed further than the mere probate of the will, may be a matter of some doubt. Sec. 3793, R. S., provides that upon the probate of such foreign will the court shall grant letters testamentary, or letters of administration with the will annexed, *except* where it shall appear that there are no debts due from the estate to parties residing in this state. It is alleged in the complaint that there are no debts due from Walsh's estate to residents of Wisconsin. We do not deem it necessary, however, to decide whether this clause would prevent the issuance of letters in a case where there are no debts due to residents of this state. In our opinion the case presented is one which calls for the exercise of the general equity powers of the circuit court, notwithstanding the fact that the plaintiff, by proceeding in the county court, might obtain some part of the relief which it seeks.

The complaint charges that the defendant has, in fraud of the plaintiff's rights, allowed the taxes to remain unpaid upon the lands, and procured to be issued to herself a tax deed upon the same, which she now claims to be a good title. This introduces a fact in the case peculiarly appropriate for the exercise of the powers of a court of general equity jurisdiction. The setting aside of this deed is absolutely essential to the full and adequate measure of relief to which the plaintiff is entitled, if its complaint be true. Without this relief it has not fully subjected the land to

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its rights as beneficiary of the trust. This consideration certainly brings the case within the line of cases in this court which uphold the jurisdiction of the circuit court in the administration of trusts. *Hawley v. Tesch*, 72 Wis. 299; *Lamberton v. Pereles*, 87 Wis. 449. No reason is perceived why the trust now existing in this land in favor of the creditors of the estate of Walsh may not be administered in the circuit court, which has full and plenary power in such matters. If there be other creditors than the plaintiff the court can readily ascertain that fact, and they may be made parties to the action. We think the demurrer was properly overruled.

By the Court.— Order affirmed.

GIFFORD, Appellant, vs. HARDELL, Respondent.

October 23 — November 13, 1894.

Bank checks: Presentation: Reasonable time: Discharge of indorser.

1. Checks drawn on a Milwaukee bank were indorsed by defendant and delivered to plaintiff's agent at Dousman on July 17, and the agent at once mailed them to the plaintiff at New Richmond, where they were received on July 18 and at once delivered to a local bank for collection. That bank, having no correspondent in Milwaukee, immediately mailed the checks to its correspondent in Chicago, and from there they were forwarded to Milwaukee, but were not presented for payment until July 21. The bank upon which they were drawn had then failed, having closed its doors at the usual hour on July 20. If the checks had been sent directly to Milwaukee from New Richmond they would have arrived in time for presentation on July 20, and if then presented would have been paid. *Held*, that they were not presented within a reasonable time after their indorsement and delivery by defendant, and that he was not liable as indorser thereon.

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2. The period of reasonable time for presentation, as between the plaintiff and the defendant as indorser, began when the checks were delivered to plaintiff's agent.

3. In general, when a check is received in a place distant from the place where the bank on which it is drawn is located, the rule of diligence requires that it should be forwarded to the latter place on the next secular day after its receipt, and be presented for payment on the day after it has reached such place by due course of mail.

APPEAL from the County Court of *Waukesha* County.

This action was brought to recover against the defendant, as indorser, the amount of four checks drawn on the Commercial Bank of Milwaukee by one Musselman, in favor of divers persons, and which had been indorsed to the defendant, who on the 17th of July, 1893, sold and indorsed them to the plaintiff. They were indorsed and delivered to the plaintiff's father at Dousman, Waukesha county, Wis., who at once mailed them to the plaintiff at New Richmond, Wis. The checks were not presented for payment until the 21st of July, when the Commercial Bank had failed, and were protested for nonpayment.

The only question was whether the plaintiff, or his agent, the Manufacturers' Bank of New Richmond, Wis., which undertook the collection of the checks, used due diligence in presenting them for payment. They were forwarded to the plaintiff at New Richmond, by his father, on the day they were indorsed, and received by him, by due course of mail, July 18th, at 5 o'clock P. M., and were at once delivered to said Manufacturers' Bank for collection. It immediately inclosed and mailed the checks to its bank correspondent in Chicago for collection, according to its usual custom, having no regular bank correspondent in Milwaukee. They were received and forwarded by the National Bank of Illinois, of Chicago, to Milwaukee, Wis., but were not presented for payment until the 21st of July. The Commercial Bank of Milwaukee, upon which they

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were drawn, failed, closing its doors at the usual hour on the 20th of July. There was a direct mail route from New Richmond to Milwaukee, and thence to Chicago, the latter city being about eighty-five miles south of Milwaukee. The evening mail of the 18th of July at this time left New Richmond at 8:41 P. M., and would have reached Milwaukee at 11 o'clock in the forenoon of the 19th, and Chicago at about 1 o'clock of the same day; and the checks arriving at Milwaukee, as above stated, could have been presented for payment at 10 o'clock in the morning of the 20th, while the bank on which they were drawn was honoring its checks. The court held that sending them by way of Chicago for collection was not the use of reasonable diligence in presenting them for payment, and directed a verdict for the defendant, and from a judgment thereon in favor of the defendant the plaintiff appealed.

For the appellant there was a brief by *Ryan & Merton*, and oral argument by *T. E. Ryan.*

Warham Parks, for the respondent.

PINNEY, J. The same rules which exist in relation to the necessity of presentment and notice, in order to charge the indorser of bills of exchange in general, apply as well to an indorser of a check. A check on a bank is presumed to be drawn against deposited funds, and, unlike a bill of exchange, which need not be drawn on a deposit, is generally designed for immediate payment and not for circulation. For this reason it is of greater importance than in the case of a bill that a check shall be promptly presented and the drawer notified of nonpayment, so that he may speedily inquire into the cause of refusal and take prompt measures to secure his funds deposited in the bank. The indorsers of bills and of checks stand on the same footing in reference to the effect of delay or failure in making presentment or giving notice of nonpayment, and are absolutely and en-

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tirely discharged if presentment be not made within a reasonable time; and this rule applies as between an indorser and indorsee, as in the present case.

It is plain from the facts that, if the bank at New Richmond had forwarded the checks direct to Milwaukee for collection, they would have been received, at the furthest, in time for presentation and payment on the 20th of July, and while the bank on which they were drawn was transacting its usual business; and it appears that it had ample funds of the drawer with which to have paid them. The period of reasonable time for presentation, as between the plaintiff and the defendant as indorser, undoubtedly began when the checks were delivered to the plaintiff's father for him, at Dousman, Waukesha county, Wis., on the 17th of July. Daniel, Neg. Inst. §§ 1586, 1587, and cases in notes. The drawer of a check cannot rightfully withdraw his funds necessary for the payment of it upon proper presentation, and it would be unjust to hold that, however long the holder might permit the fund to remain, it should be at the drawer's risk. Hence, the check must be presented within a reasonable time or the indorser will be discharged, and the fund is at the risk of the holder if he permits the deposit to remain. No transfer, or series of transfers, can prolong the risk of the drawer or indorser beyond this period, though each party is allowed the same period as between himself and his immediate predecessor that the payee had as between himself and the drawer; for no transferee can stand on any better footing than his transferrer in respect to the time within which the check must be presented in order to render the drawer's or previous indorser's liability absolute in the event of the failure of the bank. Daniel, Neg. Inst. § 1595, and cases in note.

The rule of diligence as between indorsee and indorser is the same as between payee and drawer. This requires, in general, that, where the payee receives the check from the drawer in a place distant from the place where the

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bank on which it is drawn is located, it will be sufficient for him to forward it by post to some person at the latter place on the next secular day after it is received, and then it will be sufficient for the person to whom it is thus forwarded to present it for payment on the day after it has reached him by due course of mail. When the defendant delivered the checks, properly indorsed, at Dousman, Wis., on the 17th of July, he had a right to assume and expect that the plaintiff or his father would present them for payment within a reasonable time, and they took the risk of making such presentment. Instead, they were sent several hundred miles to the northwest of Milwaukee, to New Richmond, and then back *through* Milwaukee to Chicago, and were then returned to Milwaukee for payment on the 21st, as before stated. It is clear that they were not presented for payment within a reasonable time after indorsement and delivery by the defendant, and the judgment of the county court was therefore correct. *First Nat. Bank v. Miller*, 37 Neb. 500, and cases cited.

By the Court.— The judgment of the county court is affirmed.

MALONE, Respondent, vs. KNICKERBOCKER ICE COMPANY, Appellant.

October 23 — November 13, 1894.

Statute of frauds: Oral promise to pay debt of another: Physicians and surgeons.

Plaintiff, as a surgeon, attended an injured employee of defendant, having been called by a third person. After a part of the services had been rendered and charged to the employee on plaintiff's books, defendant's manager said to him: "Take care of Jim [the employee]. We intend to see the boy through." *Held*, that if this was a promise to pay for plaintiff's services it was not valid as to the services already rendered, because not in writing as required by subd. 2, sec. 2307, R. S.

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APPEAL from the County Court of *Waukesha* County.

This is an action to recover for surgical services and medical attendance by the plaintiff upon an employee of the defendant. One of the defendant's employees, named Malcomson, met with an accident by which his ankle was fractured. The plaintiff was called to his assistance by parties not connected with the defendant. The plaintiff set the ankle, and gave such other assistance and attention as was necessary. He made charges for such services, in his book, against Malcomson. The plaintiff claims that, two or three days after he had set the ankle, he met Field, the general managing agent of the defendant, when the following conversation occurred: "He [Field] said to me: 'Doctor, what do you think of Jim?' I told him: 'I don't know yet what it will come to.' He said: 'Take care of Jim. We intend to see the boy through.'" Field denies recollection of such a conversation.

After the evidence was in, the defendant asked for an instruction to the effect that plaintiff was not entitled to recover for services rendered to Malcomson before the time of the alleged conversation with Field. This the court refused to give, and gave nothing equivalent in the general charge. The court charged the jury, in effect, that if the jury believed that the conversation occurred the plaintiff might recover his entire bill.

There was a verdict for the plaintiff for the amount of the entire bill. From judgment on the verdict the defendant appeals.

Warham Parks, for the appellant, cited *Tileston v. Nettleton*, 6 Pick. 509, 510; Roberts, Frauds, 216–225; *Swan v. Nesmith*, 7 Pick. 220; Chitty, Cont. (3d Am. ed.), 202 *et seq.; Elder v. Warfield*, 7 Harr. & Johns. 391; *Cutler v. Hinton*, 6 Randolph, 509; *Skelton v. Brewster*, 8 Johns. 376; *Slingerland v. Morse*, 7 id. (2d ed.), 463, note *a; Bailey v. Freeman*, 11 id. 221; *Chase v. Day*, 17 id. (2d ed.), 115,

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note *a;* 2 Starkie, Ev. (5th Am. ed.), 345, 346, notes; *Hooker v. Russell*, 67 Wis. 257; *Willard v. Bosshard*, 68 id. 454; *Clapp v. Webb*, 52 id. 638.

For the respondent there was a brief by *Ryan & Merton*, and oral argument by *T. E. Ryan.*

NEWMAN, J. The defendant was not liable to the plaintiff for the services which he rendered to Malcomson, unless the defendant employed him to render the services. It is not claimed that the defendant employed him prior to the alleged conversation with Field, nor otherwise than by that conversation. A considerable part of the services — more than one third of the entire bill — was rendered before the time of that conversation. If the defendant is liable at all, it is by reason of that conversation. Up to that time the debt was the debt of Malcomson, and charged to him on plaintiff's book. If it ever became the debt of the defendant, it is because the words of Field can be construed to be a promise of the defendant to pay it. The words alleged to have been used by Field are not an unequivocal promise to pay for any part of plaintiff's services to Malcomson, but they possibly may be construed to be such a promise; but, as to that part of the services rendered before that time, they could hardly be held to be a valid promise, in view of the statute (R. S. sec. 2307, subd. 2), which provides that every special promise to answer for the debt, default, or miscarriage of another person shall be void unless it be in writing. It could be good by way of ratification only when it should appear that the services had really been rendered upon the defendant's credit, and that the defendant's agent, Field, knew that fact at the time of making the promise. *Ladd v. Hildebrant*, 27 Wis. 135. The instruction requested, or its equivalent, should have been given.

By the Court.— The judgment of the county court is reversed, and the cause remanded for a new trial.

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SPEAR, Respondent, vs. SWEENEY, Appellant.

October 24 — November 13, 1894.

Assault and battery: Damages: Instructions to jury: Evidence: Cross-examination to show that plaintiff was shamming insanity: Restriction: Malice.

1. In an action for assault and battery, plaintiff's evidence tended to show that his injuries were very serious, and had rendered him insane, and that he would never recover from the effects thereof, and was insane or partially insane at the time of the trial; but defendant claimed that plaintiff's apparent mental weakness was a sham. After charging the jury that plaintiff was entitled to some damages, and that the only question was as to the amount, the court said that the injuries were either very severe and serious, resulting perhaps in making plaintiff a physical and mental wreck, or were very slight and the plaintiff had all the time been shamming and was a huge fraud, and that it was for the jury to determine which of these things was true. *Held*, not improper.
2. It was not error for the court to say, in charging the jury, that it made no difference what particular disease it was with which plaintiff was afflicted after the assault, and "it makes no difference whether it was meningitis cerebral or spinal, or any other disease which has a Latin or Greek name. The question is, What was his condition at that time as a result of the assault?"
3. The extent to which cross-examination of the plaintiff should be allowed for the purpose of showing that his want of memory and apparent mental weakness was a mere pretense, especially where such cross-examination related to facts collateral to the issue, was a matter resting very much in the sound discretion of the trial court; and the limitation of the cross-examination in this case was not a manifest abuse of such discretion.
4. It was not error to say, in charging the jury, that they had had an opportunity to observe the physical and mental condition of the plaintiff as far as possible from his appearance and testimony on the stand.
5. Evidence of threats and abusive language uttered by defendant in reference to plaintiff, fourteen hours after the assault was committed, was admissible to show express malice in the assault.
6. The damages, assessed at $3,250, are *held* not excessive.

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APPEAL from the Circuit Court for *Dodge* County.

This is an action for an assault and battery committed on the plaintiff by the defendant September 30, 1892. The answer is a general denial. At the close of the trial the jury returned a verdict in favor of the plaintiff, and assessed his damages at the sum of $3,250. From the judgment entered thereon the defendant appeals.

James E. Malone, attorney, and *James J. Dick*, of counsel, for the appellant, to the point that it was error to restrict the cross-examination of the plaintiff, cited *Kirschner v. State*, 9 Wis. 143; *Knapp v. Schneider*, 24 id. 70; *Dist. of Columbia v. Armes*, 107 U. S. 521; 1 Greenl. Ev. § 446; *People v. Russell*, 46 Cal. 121; *Yanke v. State*, 51 Wis. 464, 467; *Ranger v. Goodrich*, 17 id. 78, 82; *Kellogg v. Nelson*, 5 id 131.

Harlow Pease, for the respondent.

CASSODAY, J. It appears that September 12, 1891, the defendant let his farm of 200 acres to the plaintiff to work on shares for the term of five years; that thereupon the plaintiff moved into one of the dwelling houses on the farm, and took full control and possession of the whole farm under the lease, except that the defendant continued to live in another house upon the farm, which, together with the right to take water from the wells and feed and stable one horse, was reserved by the defendant in the lease; that in 1892 the plaintiff raised upon the farm, and placed in the granary thereon, about 1,000 bushels of barley; that soon after the defendant put a lock on the granary door, and fastened iron bars across the windows, to prevent the plaintiff from going into the granary; that the barley was damp and needed attention to prevent it from heating; that the plaintiff repeatedly asked the defendant to open the door of the granary, or to give him the key so that he could unlock it, but the defendant at all times re-

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fused; that on the evening of September 30, 1892, the plaintiff informed the defendant that he must open the door before sunrise of the next morning, or that he (the plaintiff) would open it himself; that the next morning, the defendant having failed to open the door as so requested, the plaintiff took a cold chisel and a monkey wrench, and went to the granary door to take off the lock; that while in the act of doing so, and standing upon a box about eighteen inches high, with his face towards the door, the defendant picked up a piece of fence board, and struck the plaintiff with it on the shoulder and on the back. This is frankly admitted by the defendant, although he claims that he so struck after the plaintiff had refused to stop so taking off the lock and had raised the wrench to strike him. The witnesses on the part of the plaintiff state the facts much stronger against the defendant, and to the effect that he struck him upon the head as well as the back.

Upon the undisputed evidence, we think the trial court was justified in charging the jury, in effect, that the plaintiff was entitled to some damages, and that the only question for them to consider was as to the amount of damages actually resulting from the assault and battery. And in that connection we do not think it was improper for the court, in charging the jury, to say "that either those damages were very severe and serious, resulting perhaps in making the plaintiff a physical and mental wreck, or they were very slight, and the plaintiff has all through since that time been shamming and is, in plain language, a huge fraud. Now, it is for you to determine which of these things are true."

It is claimed on the part of the plaintiff, and the evidence on his behalf tends to prove, that he was very badly injured by the blows inflicted; that in consequence thereof he was confined to his bed and under the care of physicians for several months; that during the time he was more or

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less delirious, and suffered intense pain, and had meningitis, which finally terminated in insanity, and that he was legally declared insane and sent to the insane asylum, but was discharged therefrom January 16, 1894; that he continued to be treated by a physician, and will never recover from the effects of the injury; and that he was insane, or partially insane, at the time of the trial. The defendant claims that the plaintiff's assumed mental weakness at the time of the trial was a pretense and a sham, and he assigns error because the court did not allow him more latitude, on cross-examination, to expose the same. After the defendant's counsel had cross-examined the plaintiff to the extent of three and one-half typewritten pages, he was asked numerous questions as to what he had said to divers other persons, whereupon the court interrupted the examination, and the following took place: "*The Court:* I don't think these questions are competent. If he told these people that, you can show it by them without calling his attention to it. That is one rule. It is a settled law; no use talking about that. You can show the statement of the party, and anything about it. It has been the law ever since there was a law. If he is in the condition, as I have said two or three times,— if it is a sham,— that is one thing; but it don't go to the impeachment, if he don't know and don't remember those things. He says he never told them; he don't pretend to tell; he can't even tell where he has lived; he can't tell where he came before he came to Wisconsin. Now, it is either a sham, it is a huge fraud, and he is a fraud, and his case is a fraud, or else a cross-examination don't amount to anything; that is all there is to it. But you can't prove a fraud by him, evidently. If you can establish that,— if you should persuade this man to tell what you could prove by a dozen witnesses,— it wouldn't have any effect on the case, if he is in the condition he claims to be. *Witness continues:* I don't remember what day it was that *Mr. Swee-*

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ney struck me with this board, and I don't remember what month it was. *Q.* What year was it? *The Court:* I can't allow it, Mr. Malone; you must stop that kind of examination. *A.* I don't remember what year. *Mr. Malone:* Do you rule that I shall desist from cross-examining him? *The Court:* I rule that, in the condition that the witness appears to be and claims to be, these questions are not proper. You are at perfect liberty in the case, by other witnesses or by circumstances, to show it is a sham. Just as if it was a little child there, and you were asking him questions that had nothing at all to do with the case. *Mr. Malone:* Then the court holds that I have no further right to cross-examine this witness? *The Court:* Any questions of that kind; and I can't conceive of any questions that you have a right to ask him now."

The object of such cross-examination was not only to test the accuracy and credibility of the plaintiff as a witness, but to show that his mind was stronger and his memory better than would appear from his direct examination,— in other words, that his want of memory and apparent mental weakness was a mere pretense. The extent to which such cross-examination should be indulged, especially where it relates to facts more or less collateral to the issue, is a matter resting very much in the sound discretion of the trial court; and hence this court will not reverse such rulings unless there has been a manifest abuse of such discretion. *McNair v. Rewey*, 62 Wis. 170; *Norris v. Cargill*, 57 Wis. 251; *Blitz v. U. S.* 153 U. S. 312. There does not appear to have been any such abuse of discretion in the case at bar.

We are constrained to hold that there was no error in refusing to instruct the jury that: "If the plaintiff in this case was attempting to strike the defendant with the wrench, or with anything, and put him in fear, he had a right to defend himself; and if the defendant did not use any more force than was necessary to protect himself, then

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the defendant is not guilty of assault, and the plaintiff cannot recover."

Error is assigned because the court said, in charging the jury: "In my judgment, it don't make any difference what the peculiar, particular disease was with which *Mr. Spear* was afflicted after that transaction, if he was afflicted at all. It makes no difference whether it was meningitis cerebral or spinal, or any other disease which has a Latin or Greek name. The question is, What was his condition at that time, as a result of the assault committed by *Mr. Sweeney?*" The real point was that the jury were not to be misled by technical names, but to consider the plaintiff's real condition.

We find no error in the portions of the charge wherein the jury were told, in effect, that they had had an opportunity to observe the physical and mental condition of the plaintiff as far as possible from his appearance and testimony on the stand; that if the assault was committed with malicious motives, then they were at liberty to allow punitory as well as compensatory damages; that in case they allowed punitory damages, then they were at liberty to consider the amount of the defendant's property.

It appears that the plaintiff's hired girl, who was present at the time of the assault and battery, went to Watertown the same day as a witness in the matter; and she was allowed to testify that she returned before the plaintiff; that while she was in the plaintiff's dooryard the defendant said, "You son of a bitch! come out of here," and "God damn you! come out of there;" and then, after the plaintiff returned, the defendant again said, "God damn you, *Spear!* I'll kill you before morning." In determining the admissibility of such testimony, we must assume that such statements were in fact made, notwithstanding the denial of the defendant. It does not appear that the defendant knew the plaintiff was not in his house when he made the first two statements quoted. Both statements, therefore,

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may have referred to the plaintiff. The defendant would hardly speak of the girl as a "son of a bitch." If they did both refer to the plaintiff, then they were both competent as showing express malice, and the same is true in respect to the last statement. If the words were equivocal, then their meaning was for the jury. The particular objection to the evidence seems to be that the words were spoken fourteen hours after the assault. But that does not make them irrelevant for the purpose mentioned.

We cannot say that the damages are excessive. The notice of appeal is sufficient. We find no error in the record.

By the Court.—The judgment of the circuit court is affirmed.

NICOLAI, Appellant, vs. THE TOWN OF VERNON, imp., Respondent.

October 24 — November 13, 1894.

Towns: Highways: Removal of encroachment: Injunction: Parties.

The removal of a fence by the supervisors and pathmaster of a town, on the claim that it encroaches upon a highway, is an act within the scope of their general official duties, and, if unlawful, the town is liable therefor; and where such removal is threatened, the town is a proper party to an action to prevent it.

APPEAL from the Circuit Court for *Waukesha* County.

This is an action in equity to prevent the threatened removal of plaintiff's fences and the taking of a strip of his land for highway purposes. The complaint alleges, substantially, plaintiff's ownership of 200 acres of land in the defendant town, bordering on a certain highway, and alleges that the defendant town and the other defendants, who are alleged to be the supervisors and pathmaster of

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the town, threaten and are about to enter on plaintiff's premises and remove his fence along said highway, and to unlawfully appropriate and use for highway purposes a long strip of plaintiff's land adjoining said existing highway, and that no legal proceedings have been had for the change or alteration of the line of said highway. Irreparable injury is alleged, and a perpetual injunction is prayed for against all the defendants, preventing such threatened acts.

The town of *Vernon* demurred to the complaint generally, and on the ground that there is a defect of parties defendant. From an order sustaining this demurrer, the plaintiff appealed.

The cause was submitted for the appellant on the brief of *Lindley Collins*, attorney, and *Christian Doerfler*, of counsel, and for the respondent on that of *Ryan & Merton*.

To the point that the town could not be held liable for the acts of its officers which are clearly outside of the scope of their authority and therefore unlawful, counsel for the respondent cited *Owens v. Milwaukee*, 47 Wis. 462; *Wallace v. Menasha*, 48 id. 79; *Williams v. Yorkville*, 59 id. 119.

WINSLOW, J. The only reasonable construction of the complaint is that the supervisors and pathmaster of the town, in their official capacities, are about to remove plaintiff's fence, on the claim that it encroaches upon the public highway. This would be an act within the scope of their general official duties, and evidently done with an honest view (no bad faith being charged) to obtain for the town a benefit. It would be the attempted discharge of a municipal or corporate duty, as distinguished from a public or governmental duty. In such cases the municipality is liable if the acts of its officers prove to be unlawful. *Hurley v. Texas*, 20 Wis. 634; *Durkee v. Kenosha*, 59 Wis. 123. If the municipality is liable for an act of its officers, it must

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be because the officers were its agents in the performance of the act, and the municipality has acted through its agents. In this case, therefore, under the allegations of the complaint it appears that the town is in fact the principal in the threatened invasion of plaintiff's lands; and, if it be the principal, it is plainly a proper party to the action brought to prevent the invasion.

By the Court.— Order reversed, and action remanded for further proceedings according to law.

ANSORGE, Assignee, Respondent, vs. BARTH and wife, Appellants.

October 25 — November 13, 1894.

Debtor and creditor: Fraudulent conveyances: Husband and wife: Business carried on in son's name.

1. An insolvent debtor has a right, as against his creditors, to give to his son his exempt property and also his time in carrying on and managing his son's business.
2. But an insolvent debtor cannot accumulate property under cover of another's name, acting ostensibly as the agent of such other, and hold it as against his creditors; and where such a claim is made, it is always a question of fact whether the business actually belongs to such other person, or to the ostensible agent and debtor, and whether the alleged agency was a mere scheme and device to conceal and keep the property used in or gained by it from his creditors.
3. Land purchased in the name of the wife of an insolvent debtor was paid for out of the proceeds of a business carried on by him in the name of his son. In an action to subject such land to the payment of his debts, the evidence — showing, among other things, that the wife had no separate estate, and that the son had contributed nothing to the business but the use of his name, and had paid no attention to the purchase of the land, which was managed by his father; and not showing that the son had ever received any of the proceeds

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of the business, or that there had ever been an accounting between him and his father in reference thereto — is *held* to sustain findings of the trial court to the effect that the debtor was the real owner of the business, and carried it on in the son's name for the purpose of fraudulently concealing it and its profits from his creditors; that the land was purchased with such profits and conveyed to the wife and accepted by her with the same fraudulent intent; and that it should be conveyed by her to her husband's assignee for the benefit of creditors. *Mayers v. Kaiser*, 85 Wis. 382, distinguished.

APPEAL from the Circuit Court for *Brown* County.

This action was brought by the plaintiff, as assignee of the defendant *A. Joseph Barth* for the benefit of his creditors under an assignment made July 31, 1889, against the assignor and *Anna Barth*, his wife, to reach and subject to the payment of the debts of the assignor three certain parcels of real estate, purchased and conveyed to the defendant *Anna Barth*,— one October 15, 1883; one October 25, 1886; and one September 20, 1888,— all for the price and of the value of about $5,600. It was charged, in substance, that said real estate was purchased with the money and funds of her husband, *A. Joseph Barth*, derived from a business carried on nominally in the name of his son Alois Barth, but really and in fact by his said father and for his sole benefit, and that he caused the title to said real estate to be conveyed, by the parties from whom he purchased it, to his wife, for the purpose and with the intent of defrauding his creditors.

The defendants denied the fraud charged; and, after trial, the court found that before and at the time of making the assignment the defendant *A. Joseph Barth* was indebted to one Mary Van den Braak on a judgment rendered against him and in her favor October 19, 1878, for $11,213.58, on which there still remained due and unpaid $10,700 and interest from January 1, 1881, and she had filed her claim thereon against *Barth's* assigned estate; that he was insolvent in May, 1881, and owned no property not exempt from

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execution; that he then commenced to carry on a wholesale liquor business, conducting it in the name of A. Barth, his son, and ever since carried on the same, pretending that he was the agent of his said son therein, when in fact the business belonged to said *A. Joseph Barth*, who was, as between himself and his son, the real owner thereof, all for the purpose of fraudulently concealing the profits and proceeds of said business from his creditors, and especially from Mary Van den Braak; that in fact the said son, A. Barth, never owned any interest in said business, although the legal title thereto was in his name, and he still claimed to be in possession and control of it and its assets; that the parcels of land mentioned were purchased at the times stated with and out of the profits and proceeds of said business, and conveyed to the defendant *Anna Barth* with the fraudulent intent of keeping the same from the creditors of the assignor; that she accepted such conveyances without paying anything therefor, and with the intent and purpose of aiding her husband in defrauding his creditors, and also accepted an assignment of one share of stock in the Fair & Park Association of Green Bay, Wis., of the value of $600, but purchased and paid for by her said husband; that prior to the action *A. Joseph Barth* had made application, based on said assignment and proceedings thereon, to be discharged from his debts.

It was found, among other things, as matter of law, that said defendant *Anna Barth* held said parcels of real estate and share of stock in trust for the creditors of her husband, *A. Joseph Barth;* that she should convey and assign said property to the plaintiff, her husband's assignee, to be disposed of by him in payment of the debts of her husband; and that he should deliver up possession thereof accordingly, and be restrained from transferring or incumbering the same; and that the plaintiff should sell and dispose thereof according to the terms of the assignment and

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of the law; and that the plaintiff recover his costs. Judgment was given accordingly, from which the defendants appealed.

For the appellants there were briefs by *Wigman & Martin*, attorneys, and *Joshua Stark*, of counsel, and oral argument by *Mr. Stark* and *Mr. P. H. Martin.*

For the respondent there was a brief signed by *Ellis, Greene & Merrill*, attorneys, and *E. H. Ellis*, of counsel, and oral argument by *E. H. Ellis.*

PINNEY, J. It appears that the assignor, *Barth*, in 1874, was engaged with others in the wholesale liquor business, and they failed. All the assignor's property not exempt from execution was taken on execution and sold. With his exemptions, amounting to $200, he started a saloon, and continued in that business until May, 1881, but without much success, for it is conceded that he was still insolvent and owned no property not exempt. He had a family of eight children, six of whom lived with him. His oldest son, Alois, was, and for some years had been, engaged in carrying on successfully the business of manufacturing and selling cigars upon premises adjoining the building in which the assignor, *Barth*, had his saloon. The appellants claimed that in May, 1881, the assignor, *Barth*, sold and transferred his saloon business and the exempt property he owned connected therewith to his son Alois, and that thereafter the business was carried on by and in the name of the son, by whom the license fees and special taxes on the business were paid; that the assignor, *A. Joseph Barth*, was employed as manager of the business, at a salary of $60 a month during the first two years, and thereafter of $70; two other sons were also employed upon various salaries in the said business; that, shortly after purchasing the saloon, Alois borrowed $400, and started in a small way a wholesale liquor business upon the same premises. It ap-

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peared that the special taxes to the United States for the liquor business had been charged to Alois, the son, each year from May 7, 1883, to July, 1892, and receipts given therefor were in his name, and that licenses were issued for the same business by the city of Green Bay to him from May, 1887, to May, 1892; that Alois Barth did not actively participate in the management of the saloon or the liquor business, but they were entirely conducted by his father. It seems to be a fair conclusion from the evidence that the proceeds of the cigar business were not used in any way for the saloon or liquor business, but that each business was managed and conducted entirely separate from the other; and the question presented was whether the title and ownership of the son to the saloon and liquor business and its proceeds were real and *bona fide*, or whether they were merely simulated, and a sham and cover to protect and keep the property from his father's creditors, and enable him to enjoy and dispose of it at his pleasure.

There was some evidence tending to show that on a few occasions the father had spoken and acted in reference to the business as his own, but it was all transacted in the name of the son. It was shown beyond dispute that the property in question was purchased and paid for, and some of it considerably improved, from the proceeds of the liquor business. The assignor, *Barth*, was during all these years insolvent, and there was a judgment over him, upon which there was due over $10,000, besides interest; and this fact shows a strong motive why a man not more than fifty-four years old consented to become a subordinate and servant where he had hitherto been owner and master. After the lapse of a considerable number of years, he made the assignment, upon the basis of which he now seeks to obtain a discharge from his debts; and this is significant, and shows his anxiety to be again in a position to transact business in his own name; but, if the theory advanced by the

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appellants is true, he has no means whatever with which to engage in any business pursuit. A careful examination of the evidence shows, so far as we can discover, that all that Alois, the son, ever contributed to the business, was the mere use of his name; for it is doubtful if he ever paid his father anything for the exempt property, and the borrowed money raised to extend the business was, no doubt, paid out of its profits. There is certainly no evidence that Alois paid anything out of the proceeds of his cigar business to or for the benefit of the saloon or liquor business, and there was no substantial or satisfactory change of possession at the time of the alleged transfer. The facts upon which the defendant *Anna Barth* founds her title are certainly very equivocal, not to say suspicious. Besides, the relations existing between the parties are such that, while they are not *per se* a badge of fraud, yet they facilitate and render its perpetration comparatively easy, and are proper matter for consideration in connection with all the facts and circumstances. *Hoxie v. Price*, 31 Wis. 82, 86; *Beard v. Dedolph*, 29 Wis. 136. The assignor and his wife, as well as Alois, all testified that the business belonged to and was the business of the latter, and that his father had no interest in it: but their statements to this effect are, to a great extent, matter of opinion and conclusion, and, in view of the circumstances, are not very satisfactory evidence. Neither the books kept in the liquor store or cigar business, nor any documentary evidence whatever, beyond the deeds to the real estate and the licenses and tax receipts, were presented to sustain the title of the defendant *Anna Barth* as against the claim of her husband's creditors and the circumstantial and cogent evidence of fraud thus presented.

The issue was a narrow one; namely, whether *A. Joseph Barth* was merely a *bona fide* employee, without interest or ownership, or not. There was no evidence to show that Alois ever actually received any of the proceeds of the sa-

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loon or liquor business, or that there was ever any accounting between the father and son, or any balance stated in relation to a business wholly managed by the former and entirely separate and distinct from the cigar business of the son; and, while the liquor business must have been quite a considerable one, the books kept in it were not produced, showing the amount of profits gained, or what disposition or use had been made of them, beyond the purchase of the property in question. The testimony of Alois Barth in regard to the purchase of the real estate places whatever might otherwise be considered equivocal or ambiguous in a strong and clear light. He said his father managed the purchase of the real estate, and added: "I could not tell you anything about that. *It may be so. I don't know.* I might have heard my father say something about it, but *I never paid any attention to it.* My mother might have spoken of it, but it *has escaped my memory.* I have enough to do to mind *my own business.*" And yet he claims that he furnished the money to purchase the property, and that it was the proceeds of *his* liquor business; that he kept an account of the money in his mind, but in no other way. He says he was not present when the bargains were made for the property; that he did not attend to the buying of it, but his father might; that it might have been by some other person. "I don't know anything about it. Q. You didn't have any interest in that? A. No." Although he subsequently said he had "something to say about the payment, and the manner in which it was to be made," but what he does not state, and that the deed was to be made in the name of his mother, but this may have been merely advisory.

The theory of the defense is that Alois gave his mother this money, part of the proceeds of the liquor business, with which the property in question was purchased; and it is claimed that the assignor, the husband, as against his

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creditors, had a right to give Alois his exempt property, and his time as well in managing the business. As matter of law, this is correct and must be conceded. *Carhart v. Harshaw*, 45 Wis. 340; *Allen v. Perry*, 56 Wis. 185; *Dayton v. Walsh*, 47 Wis. 113; *Mayers v. Kaiser*, 85 Wis. 382. But an insolvent debtor cannot accumulate property under the cover of another's name, acting ostensibly as the agent of such other, and hold it as against his creditors; and where such a claim is made, it is always a question of fact whether the business actually belongs to such other person, or to the ostensible agent and debtor, and whether the alleged agency was a mere scheme and device to conceal and keep the property used in or gained by it from his creditors. *Feller v. Alden*, 23 Wis. 301; *Hoxie v. Price*, 31 Wis. 82; *Dayton v. Walsh*, 47 Wis. 113; *Mayers v. Kaiser*, 85 Wis. 394; *Knapp v. Smith*, 27 N. Y. 280; *Abbey v. Deyo*, 44 N. Y. 347, 348.

Appellants' counsel relied on the case of *Mayers v. Kaiser*, 85 Wis. 382, as controlling the present case, but that case is clearly distinguishable from this one. In that case it was clearly shown that the wife had a separate estate, in the use of which in business she acquired the means with which she purchased the real estate in dispute; and the fact that she employed her husband as her agent on a salary, though an inadequate one, or he even gave her his services in managing the business, it was held, would not render the property liable to the claims of his creditors. Here the wife had no separate estate, and paid nothing for the property. The money with which it was purchased was given to her by her son, it is said; but we think the evidence satisfactorily shows that the title of the son to the liquor business and the money realized in it was simulated, and was fraudulent as against her husband's creditors, and that it was in fact her husband's money. It will not be contended that an insolvent husband might give his

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wife money with which to buy property, and that she could hold it as against his creditors; and yet the present case is not materially different. The trial judge heard the evidence of the witnesses, and found the claim of title of the defendant *Anna Barth* to the property in question fraudulent as against her husband's creditors, and that the money with which it was purchased was gained in a business conducted by him under the cover of the name of his son and in order to fraudulently conceal and keep the same and its profits from his creditors. We concur in this conclusion, and hold that the judgment of the circuit court is correct.

By the Court.—The judgment of the circuit court is affirmed.

SCHAUER and others, Appellants, vs. QUEEN INSURANCE COMPANY OF AMERICA, Respondent.

October 25 — November 13, 1894.

Insurance against fire: Agents: Conflicting duties: Notice of cancellation.

1. The owners of property employed insurance agents to keep it continually insured to a certain amount, a part of the insurance being taken in companies represented by such agents and a part in other companies. To avoid the necessity of sending and returning policies as they were canceled and rewritten from time to time, all of the policies were left with such agents. *Held*, that they had authority to receive, for the insured, notices of cancellation of policies.
2. The duties of such agents to the insured and to the insurers were not repugnant.

APPEAL from the Circuit Court for *Brown* County.

The plaintiffs, as partners, owned and operated a gristmill in the town of New Franken, Brown county, situated

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about fourteen miles from the city of Green Bay. The firm of A. A. Warren & Son were insurance agents doing business as such in the city of Green Bay. On January 11, 1893, the plaintiffs procured from A. A. Warren & Son, as such agents, the policy of insurance in question on said mill, insuring the same against loss by fire to the amount of $1,500 for the term of one year. On January 25, 1893, said mill was destroyed by fire; and on May 8, 1893, the plaintiffs commenced this action on said policy to recover said loss, the complaint being in the usual form.

The defendant answered, and pleaded the condition of the policy concerning the cancellation of the same, and alleged, in effect, that Warren & Son were the agents of the plaintiffs for the purpose of keeping said property insured, and as such had canceled said policy, January 15, 1893, being ten days before the fire.

At the close of the trial the defendant asked for a special verdict in the event that the case was submitted to the jury; and it was conceded between counsel for the respective parties that, if the plaintiffs were entitled to anything, they were entitled to $1,400, and interest from the commencement of this suit. Each party moved the court to direct a verdict in their favor respectively; and thereupon the court submitted to the jury two questions, which were answered to the effect (1) that A. A. Warren & Son were the agents of the plaintiffs for the purpose of procuring insurance upon and keeping plaintiffs' mill property insured to a certain amount; (2) that the business arrangements between Warren & Son and the plaintiffs, in reference to the plaintiffs' insurance, did not authorize Warren & Son to receive notice of cancellation of policies for plaintiffs. The court thereupon set aside the answer to the second question so submitted, on the ground that it was not sustained by the evidence, and rendered judgment in favor of the defendant upon the undisputed evidence and the an-

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swer to the first question, dismissing the plaintiffs' complaint. From that judgment the plaintiffs appeal.

For the appellants there was a brief by *W. H. Timlin*, attorney, and *Arthur Babbitt*, of counsel, and a separate brief and oral argument by *Mr. Timlin*. They contended, *inter alia*, that where one person, who is the agent of an insurance company, has the placing of insurance for another person, such a relation, if it constitutes an agency at all, constitutes a special agency merely, which is terminated immediately upon the procurement of the insurance, and gives no authority to such special agent to receive notice of cancellation from the company. *Body v. Hartford F. Ins. Co.* 63 Wis. 157; *Wilson v. N. H. F. Ins. Co.* 140 Mass. 210; *Latoix v. Germania Ins. Co.* 27 La. Ann. 113; *Mut. Ass. Soc. v. Scottish Union & Nat. Ins. Co.* 84 Va. 116; *Adams v. Manufacturers' & B. Ins. Co.* 17 Fed. Rep. 630; *Kehler v. N. O. Ins. Co.* 23 id. 709; *Grace v. Am. Cent. Ins. Co.* 109 U. S. 278; *Quong Tue Sing v. Anglo-Nev. Ass. Corp.* 86 Cal. 566; *S. C.* 10 L. R. A. 144 and notes; *Hermann v. Niagara F. Ins. Co.* 100 N. Y. 411; *Broadwater v. Lion F. Ins. Co.* 34 Minn. 465; *White v. Conn. F. Ins. Co.* 120 Mass. 330; *Indiana Ins. Co. v. Hartwell*, 100 Ind. 566; *Commercial Union Ass. Co. v. State ex rel. Smith*, 113 id. 331; *Mohr & Mohr Distilling Co. v. Ohio Ins. Co.* 13 Fed. Rep. 74; *Runkle v. Cit. Ins. Co.* 6 id. 148; *Ins. Co. of N. A. v. Forcheimer*, 86 Ala. 541. Even if the assured, in order to enable the agent more readily to reinsure in case of cancellation, surrenders his policy to the agent, such agent does not thereby become the agent of the assured for the purpose of cancellation; and notice of cancellation to such an agent is insufficient. *Mallory v. Ohio F. Ins. Co.* 90 Mich. 112; *Body v. Hartford F. Ins. Co.* 63 Wis. 157. The provision in a policy that "This insurance may be terminated at any time by request of the assured, or by the company on giving notice to that effect, or to the person who may

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have procured this insurance to be taken," does not cover a case where the one who procured the insurance is also agent of the company. *Ins. Cos. v. Raden*, 87 Ala. 311; *Comm. F. Ins. Co. v. Allen*, 80 id. 571, 576; *Piedmont & A. L. Ins. Co. v. Young*, 58 id. 476; 2 Wood, Fire Ins. (2d ed.), § 409; *London & L. F. Ins. Co. v. Turnbull*, 86 Ky. 230. The question as to whether the agent of the company who issued the policy was the agent of the assured for the purpose of receiving notice of cancellation, is a question of fact to be determined by the jury. *Roger Williams Ins. Co. v. Carrington*, 43 Mich. 252.

For the respondent there was a brief by *Hume, Oellerich & Sweet*, attorneys, and a separate brief by *Gabe Bouck*, of counsel, and the cause was argued orally by *J. W. Hume* and *Mr. Bouck*.

CASSODAY, J. The plaintiffs resided, and their gristmill and warehouse were situated, fourteen miles from Green Bay, where Warren & Son had for years conducted an insurance business. At the time in question, and for a long time prior thereto, the plaintiffs did all their insurance business with Warren & Son, and carried upon their gristmill and warehouse from eight to ten thousand dollars insurance. Of that amount only from five to seven thousand dollars were in companies represented by Warren & Son, and the balance Warren & Son were in the habit of procuring for the plaintiffs from other companies, through other insurance agents. The character and situation of the property seem to have made it difficult at times to procure as much insurance as the plaintiffs were desirous of carrying. The result was that policies were, from time to time, canceled by certain insurance companies, and rewritten in certain other companies. This necessitated more or less correspondence between Warren & Son and the plaintiffs, and the frequent sending and return-

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ing of policies. Apparently to obviate this difficulty, the plaintiffs, in the fall or winter of 1892, and prior to January 1, 1893, took all their policies of insurance, and delivered them to and left the same with Warren & Son, with the understanding that they should keep their property insured, in the aggregate, for the desired amount; and Warren & Son agreed to do so to the best of their ability.

It appears that in the forepart of January, 1893, Warren & Son held policies in the Oakland Insurance Company on the property of the plaintiffs, in the aggregate for about three or four thousand dollars, and one of those polices, for the amount of $1,500, was canceled by that company and Warren & Son, and in lieu thereof the policy in question, through the agency of Warren & Son, was issued by the defendant to the plaintiffs, without any previous knowledge on their part, and without their paying any premium therefor. About January 13, 1893, the plaintiffs were informed by Warren & Son that the policy of $1,500 in the Oakland had been canceled, and a new policy for the same amount had been taken in the defendant company, with which they expressed themselves satisfied. January 14, 1893, the defendant's manager wrote Warren & Son from Chicago, requesting an "immediate retirement of this policy," on the ground that the company declined all business outside of Ft. Howard and Green Bay. Warren & Son received the letter, January 15, 1893, and entered the policy canceled on the books of the company, January 19, 1893. Thereupon Warren & Son, in pursuance of such general understanding, sought to procure the same amount of insurance in other companies and through other agencies,—first in Chicago and then in Green Bay, and had succeeded, all but writing the policy, when the same was prevented by the occurrence of the fire, January 25, 1893.

The only question presented is whether the policy was effectually canceled by the notice so given to Warren &

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Son under the clause of the policy which provides that "this policy shall be canceled at any time at the request of the assured, *or by the company, by giving five days' notice of such cancellation.*" The only objection to the notice is that it should have been given to the plaintiffs personally, instead of Warren & Son; but we are clearly of the opinion that the trial court was right in holding, as a matter of law, upon the undisputed evidence that the business arrangements between Warren & Son and the plaintiffs in reference to their insurance authorized Warren & Son to receive such notice of cancellation. Besides, the answer of the jury to the first question is unchallenged. That finding is to the effect that they were such agents for the purpose of procuring insurance upon and keeping the mill property of the plaintiffs insured to a certain amount. To do that effectually required that they should have the earliest possible notice of any cancellation. To serve such notice on the plaintiffs, and not on them, would tend to defeat the very object of such agency. It certainly would in this instance, for, as it was, Warren & Son did not have sufficient time to procure a new policy — and that was the very object of requiring the notice. Upon the facts stated, we must hold that the duties of Warren & Son to the defendant and to the plaintiffs were in no sense repugnant. *Hartford F. Ins. Co. v. Reynolds*, 36 Mich. 502; *Stone v. Franklin F. Ins. Co.* 105 N. Y. 543.

By the Court.— The judgment of the circuit court is affirmed.

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CULBERTSON, Administratrix, Appellant, vs. THE MILWAUKEE & NORTHERN RAILROAD COMPANY, Respondent.

October 25 — November 13, 1894.

Railroads: Defective appliances: Injury to person: Contributory negligence.

Plaintiff's intestate, wishing to move a car loaded with lumber a short distance in the mill yard in which he was foreman, had it started by a horse on a down grade. Being unable to stop it with the brake, which was defective, he jumped from the car and ran in front of it, and attempted to stop it by putting chips, etc., under the wheels, but it continued to move, he jumping backward in front of it, until it struck and knocked down a movable tramway which extended across the track about 100 feet from the starting point. The planks of the tramway, in falling, struck and threw him under the car, and he was fatally injured. There was ample room for him to have run or walked by the side of the car, and blocks and pieces of wood there by which it could have been stopped. He knew the tramway was in the way, and that a loaded car would strike it. *Held*, that he was guilty of contributory negligence in unnecessarily putting himself in front of the car, in a place of danger.

APPEAL from the Circuit Court for *Marinette* County.

This is an action for the death of plaintiff's intestate, caused by the alleged negligence of the defendant. The deceased was the husband of the plaintiff. He was in July, 1891, yard foreman of the firm of Bird & Wells, who owned and operated a saw and planing mill at Big Wausaukee, a lumbering point on defendant's line of road. A spur track from defendant's road, about a mile in length, ran into the mill yard. The deceased had charge of the piling and shipping of lumber in the yard. When cars were required in the yard for shipping lumber, the defendant set them into the yard with an engine, and took them out again when loaded. When it became necessary to move cars from place to place in the yard, they were moved by men with pinch

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bars, or sometimes with a horse and chain, generally under the direction of the deceased. Sometimes the cars, when so moved, were stopped with a brake, and sometimes by putting blocks in front of the wheels.

On the day prior to the accident, a foreign flat car was set in the yard by the defendant's employees. It had a brake which could not be set so as to hold the car. On the 23d day of July, 1891, this flat car stood at the side of the planing mill, and was loaded with lumber under Culbertson's orders. When loaded it was desired to move it a short distance to the east, to make room for another car to come up to the mill and be loaded. There was a down grade in this direction. Culbertson was on the car, and called a yard employee, who had a horse, to hitch onto the car and move it. The employee hitched onto the car with a chain, and started the car. It began to move too fast, and Culbertson tried to stop it with the brake. Finding the brake would not hold the car, he jumped off on the north side of the car, safely, and then ran in front of the car, about the middle of the track, and began to throw chips, and anything he could pick up, under the wheels of the car; the car at the same time moving towards him about as fast as a man could walk, and he jumping back to keep out of the way. About 100 feet east of the place where the car was loaded, a movable tramway, composed of heavy, loose plank, extended at right angles across the track, and about five feet above the track, connecting two tramways on either side of the track. Culbertson knew of the tramway, it having been built under his supervision. The planks were ordinarily moved aside when cars were to be moved through it. Culbertson evidently expected to stop the car in question before reaching the tramway, but he did not succeed in doing so, and the lumber on the car struck the loose planks, throwing them down on the track. In their fall, one or more of them struck

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the deceased, knocking him down in front of the car. The car still moved perhaps a car length, and doubled up the deceased under the brake beam, and he received injuries from which he died.

It appeared that there was ample room on the side of the track, for the entire distance the car moved, so that a man could run or walk along by the side of the car without going on the track, and that there were blocks and pieces of wood there by which the car could be blocked.

These facts all appeared from the uncontradicted evidence. A verdict was directed for the defendant, and from judgment thereon the plaintiff appeals.

T. R. Hudd, for the appellant.

For the respondent there was a brief by *Greene & Vroman*, and oral argument by *C. E. Vroman.*

WINSLOW, J. It is entirely plain from the foregoing statement of facts that the deceased was guilty of contributory negligence. When he got off from the car he was on the side of the track, in a place of perfect safety. From this place of safety he voluntarily put himself, unnecessarily, in front of the car, in a place of danger. No duty called him there, because he could as well stop the car from the side as from the front. Nor did he go there to escape any peril. He knew the car was moving towards him. He knew the movable tramway was in the way, and that a loaded car would strike it. In fact, he knew all the elements of danger, and, knowing them, he voluntarily assumed the risk. Citation of authorities upon such a plain case of negligence is unnecessary.

By the Court.— Judgment affirmed.

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VAN FRACHEN, Respondent, vs. THE CITY OF FORT HOWARD, Appellant.

October 26 — November 13, 1894.

Municipal corporations: Injury from defective sidewalk: Presentation of "claim or demand:" Notice of injury: Description of defect.

1. A provision in a city charter that no action shall be maintained against the city "upon any *claim or demand of whatsoever nature*, other than a city bond or order," unless such claim or demand shall first be presented to the common council, is *held* to apply to tort actions. *Vogel v. Antigo*, 81 Wis. 642, distinguished.
2. A notice of injury from a defective sidewalk, given pursuant to sec. 1339, R. S., described the defect as an "unsound, defective, and dangerous condition" of the walk. It was proved that both the plank and stringers of the walk were rotten. *Held*, that the notice described "*generally* the insufficiency or want of repair," and was sufficient.

APPEAL from the Circuit Court for *Brown* County.

This is an action to recover for personal injuries to the plaintiff caused by a defective sidewalk in the defendant city. In the notice to the city of the accident, the place of the accident was described as being on the east side of Chestnut street, "between Dousman and Hubbard streets, and opposite the property owned by Platten Bros., and about twenty-one feet from the north corner of the barn occupied by said Platten Bros."; and the defect claimed was described as "an unsound, defective, and dangerous condition." There was some controversy in the testimony whether the notice described truly the place of the accident. The evidence showed that the planks and stringers of the sidewalk were rotten.

The plaintiff filed a notice and claim of damages with the clerk of the defendant city. The claim was disallowed by the common council. The plaintiff appealed from the order disallowing the claim to the circuit court for Brown

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county. There was a verdict for the plaintiff. From a judgment on that verdict the defendant appeals.

L. A. Calkins, for the appellant, to the point that an injury to the person occasioned by a defective sidewalk is not a "claim or demand" against a city, cited *Vogel v. Antigo*, 81 Wis. 642; *Kelley v. Madison*, 43 id. 638; *Stringham v. Winnebago Co.* 24 id. 594; *Jung v. Stevens Point*, 74 id. 547; *Bradley v. Eau Claire*, 56 id. 168; *Nance v. Falls City*, 16 Neb. 85.

For the respondent there was a brief by *Wigman & Martin*, and oral argument by *P. H. Martin*. To the point that the description of the condition of the sidewalk as unsound (rotten), defective, and dangerous is as much of a "general description" of the insufficiency or want of repair as is required by sec. 1339, R. S., they cited *Plum v. Fond du Lac*, 51 Wis. 393; *White v. Stowe*, 54 Vt. 510; *Salladay v. Dodgeville*, 85 Wis. 318.

NEWMAN, J. *In limine* is the objection that the circuit court had no jurisdiction to try the case. It is claimed that there was no authority of law to bring the case into the circuit court by an appeal from the action of the common council. Ordinarily, an action for such a cause must be brought in the ordinary way,—by the service of a summons and complaint,—in order that the court may obtain jurisdiction to try it. In an ordinary case this is necessary in order to give the court jurisdiction either of the parties or of the subject matter. But it is competent for the legislature to provide for bringing both the parties and the subject matter before the court by some different proceeding. This, it is claimed, the legislature has done. The charter of the city of *Fort Howard* provides (Laws of 1891, ch. 420, subch. 5, sec. 6): "No action shall hereafter be maintained by any person against the city of *Fort Howard*, upon any claim or demand of whatsoever nature, other than

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a city bond or order, unless such person shall have first presented such claim or demand to the common council of the city. The determination of the common council, disallowing in whole or in part any such claim or demand, shall be final and conclusive and a perpetual bar to any action in any court founded on such claim or demand, unless an appeal shall be taken from the decision and determination of said common council" to the circuit court for Brown county.

The term "claim or demand," without other words of explanation or expansion, is held to include only claims and demands arising upon contract, and does not include any cause of action arising from a tort. *Kelley v. Madison*, 43 Wis. 638; *Bradley v. Eau Claire*, 56 Wis. 168; *Vogel v. Antigo*, 81 Wis. 642. This is an action arising from a tort, and is not included in this provision of the charter of the defendant, unless it shall be held that the words "of whatsoever nature" were used by the legislature with the intention to enlarge the meaning of the term "claim or demand" so as to include causes of action arising from torts. It may not be entirely clear what the legislature intended by the use of the words "of whatsoever nature." The meaning of the words in that connection may be ambiguous. But the legislature intended them to have some force and meaning. *Harrington v. Smith*, 28 Wis. 43–67. They were absent from the defendant's charter, as originally enacted. Laws of 1873, ch. 164, subch. 5, sec. 8. They were put into the charter by ch. 420, Laws of 1891. They were introduced into the charter *ex industria*. They were intended, obviously, to explain or expand the term "claim or demand." They have no restrictive force. They evidently enlarge or expand the term. Before, that term included all causes of action arising on contract. To enlarge it, it must be held to include causes of action not arising on contract. These can be no other than torts.

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In *Koch v. Ashland*, 83 Wis. 361, the words of the charter were: "No suit of any kind or any claim of any character shall be brought against said city, but the claimant shall file his claim with the city clerk." It was held that the term "any claim of any character" includes causes of action arising on torts. It seems impossible to make a substantial distinction in the meaning of the terms "any claim of any character" and "any claim or demand of whatsoever nature." The case of *Vogel v. Antigo*, 81 Wis. 642, differs from the instant case in this: that in that case there was no provision for an appeal from the determination of the common council in the case of a claim founded on a tort, while in the instant case every other remedy is taken away in all cases, by express words. It is held that the circuit court obtained jurisdiction by the appeal.

The notice is clearly sufficient in its description of the place of the accident. And it is not clearly shown that the accident did not happen at the place described. The verdict should be held to have settled that question.

The notice is required to state "the place where such damage occurred, and describing generally the insufficiency or want of repair which occasioned it." R. S. sec. 1339. While, no doubt, a better and in many respects more satisfactory description of the "insufficiency or want of repair" of this sidewalk which caused the accident could as easily have been given, it yet cannot, perhaps, be fairly said that this does not describe "generally the insufficiency or want of repair." It was described as being in "an unsound, defective, and dangerous condition." It was proved to be rotten, both plank and stringers. It cannot well be denied that the term "unsound" describes *generally* the condition of being rotten, when applied to a sidewalk. "Unsound and dangerous" may fairly mean "so rotten as to be dangerous." So it is held that the notice is, in this respect, sufficient. It did describe generally the insuffi-

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ciency and want of repair which caused the damage. This view gets some support from ch. 85, Laws of 1893, which, though not binding as a rule of decision in this case, yet is suggestive of the legislative policy in the matter involved.

By the Court.— The judgment of the circuit court is affirmed.

DUFUR, Respondent, vs. ASHLAND COUNTY, Appellant.

October 26 — November 13, 1894.

Judgment by default: Premature entry: Vacating.

An order sustaining a demurrer to a counterclaim gave leave to amend the answer within ten days after service of notice of the entry of said order. No such notice was served, but, the answer not having been amended, judgment was taken against the defendant as by default. *Held*, that defendant was not in default and that, upon an application made at the same term, such judgment should have been vacated as a matter of right.

APPEAL from the Circuit Court for *Ashland* County.

This action was commenced June 17, 1893, to recover upon six several county orders issued by the defendant, and which had been assigned by the several payees thereof to the plaintiff. Each order is alleged in the complaint as a separate cause of action, and their aggregate amount is $221.38. The fifth cause of action is upon an order for $19.75 issued by the defendant to Edward Fenelly, August 2, 1892, and assigned to the plaintiff.

The defendant, by way of a counterclaim, alleged, in effect, that said Fenelly was county clerk of said county from January 2, 1891, to December 31, 1892; that during said time certain moneys came into his hands as such clerk by virtue of his office, to the amount of $16,163.49; that he

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had converted the same to his own use, and refused to pay the same to said county on demand, and was therefore indebted to said county thereon,—and demanded judgment against the plaintiff that the fifth cause of action be dismissed, and for costs. No defense was made to any of the other orders. The plaintiff demurred to said counterclaim on the ground that it does not state facts sufficient to constitute a cause of action or defense.

Upon the hearing of said demurrer, it was, by an order made November 20, 1893, sustained, with leave to amend the answer within ten days from service of notice *of entry of said order*, on payment of $10 costs. A copy of said order was served on the defendant's attorney, November 22, 1893. It appearing to the court, December 22, 1893, that no amended or further answer or demurrer had been served on the plaintiff's attorney, it was, on motion of the plaintiff's attorney, adjudged that the plaintiff have and recover of the defendant the sum of $221.38 damages, together with the further sum of $33 for costs and disbursements, amounting in all to the sum of $254.38.

Upon the affidavit of the defendant's attorney herein, to the effect that no notice of the entry of the said order was ever served upon the defendant or its attorney, and upon an order to show cause, at the same term of said court at which said judgment was entered, why said judgment so entered as by default should not be vacated and set aside, it was ordered by the trial court that said motion be, and the same was thereby, denied, with $5 costs. From this last order the defendant appeals.

The cause was submitted for the appellant on the brief of *R. Sleight*, and for the respondent on that of *Sanborn, Dufur & Anderson.*

To the point that a judgment irregularly obtained should not be vacated unless some defense was shown to exist, counsel for the respondent cited *Howey v. Clifford*, 42 Wis.

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561; *Bonnell v. Gray*, 36 id. 574; *Levy v. Goldberg*, 40 id. 308; *Seymour v. Chippewa Co.* id. 62; *Rollins v. Kahn*, 66 id. 658; *Salter v. Hilgen*, 40 id. 363.

CASSODAY, J. Undoubtedly, trial courts have control of their own judgments during the term at which they are entered, and during such term may set them aside for irregularities merely. As indicated in the foregoing statement, the application to vacate and set aside the judgment was made and denied at the same term of the court at which it was entered.

By the express terms of the order sustaining the demurrer, the defendant could not be put in default except by ten days' notice of the entry of said order. The rule of court required the clerk of the trial court to enter a brief statement of all applications to the court for orders "in his minute book, with the action of the court thereon," and provides that "no such order shall be operative unless such statement shall be then and there so entered." Circuit Court Rule IV, sec. 9. It is undisputed that no such notice of any such entry of that order was ever given, and it does not appear that any such entry was ever made. If it was not made, then, under the rule, it would seem the order was inoperative. The judgment was therefore so entered, not only without any notice to the defendant's attorney, but before the defendant was in default. This was improper. *Knowles v. Fritz*, 58 Wis. 216; *Reichert v. Lonsberg*, 87 Wis. 543. The application to vacate and set aside the judgment was promptly made at the same term, and should have been granted as a matter of right. It is unlike an application after the term and as a matter of favor, under sec. 2832, R. S.

By the Court.— The order of the circuit court is reversed, and the cause is remanded for further proceedings in accordance with this opinion.

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DUFUR, Respondent, vs. ASHLAND COUNTY, Appellant.

October 26 — November 13, 1894.

APPEAL from the Circuit Court for *Ashland* County. The cause was submitted for the appellant on the brief of *R. Sleight.*

CASSODAY, J. In pursuance of the stipulation filed herein, and for the reasons given in the opinion in the case of *Dufur v. Ashland Co.*, *ante*, p. 574, the order of the circuit court is reversed, and the cause is remanded for further proceedings in accordance with that opinion.

DODGE and others, Executors, Appellants, vs. ASHLAND COUNTY and another, Respondents.

DODGE and others, Executors, Respondents, vs. ASHLAND COUNTY and another, Appellants.

October 26 — November 13, 1894.

Highways: County roads: County board acts for towns: Liability for trespasses.

In laying out a so-called "county road" under secs. 1300–1307, R. S., the county officers act, not on behalf of the county, but on behalf of the towns through which the road runs; and where the proceedings are so defective that no legal highway is laid out, the county is not liable for trespasses committed by such officers in attempting to open the road.

APPEALS from the Circuit Court for *Ashland* County. Trespass for timber cut. The plaintiffs owned a large tract of timber land in the town of Vaughan, Ashland county. The county board of *Ashland* county, upon a petition signed by more than fifteen freeholders in each of

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the towns of Vaughan, Knight, Ashland, Morse, Jacobs, and Butternut, attempted to lay out a highway, under secs. 1300–1307, R. S., running through the said towns. That part of the proposed highway in the town of Vaughan ran through the lands of the plaintiffs. The proceedings were so defective that no legal highway was laid out, and this fact was conceded by the defendants on the trial. After the highway was in form laid out, the county board made a contract with the defendant *McGeehan* to open and construct that part of the same in the town of Vaughan, and in accordance with that contract *McGeehan* cut and removed a large quantity of timber of various kinds and cordwood from the plaintiffs' lands. The plaintiffs claim, and the evidence seems to show, that a part of this timber and wood was cut outside of the lines of the proposed highway.

The court directed a verdict for the plaintiffs against both defendants, and only left to the jury the question of the amount and value of the cordwood removed, there being no dispute under the evidence as to the amount of timber. The verdict was for the following sums: For pine timber converted, $289.92; for spruce timber converted, $9.44; for basswood timber converted, $46.20; for cordwood, $190.00; total, $537.56. The plaintiffs moved for judgment *non obstante veredicto* for $1,573.08 against the county for timber and wood cut within the right of way, and for $259.90 against *McGeehan* for timber and wood cut outside the right of way, claiming that these sums were proven by the uncontradicted evidence; which motion was overruled, and the plaintiffs excepted. The plaintiffs then remitted from the verdict $41.58 from the amount found to be due for basswood, the verdict by error placing said amount at $46.20, when it should have been $4.62. Both parties moved to set aside the verdict and for a new trial, and both motions were overruled and exceptions

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taken. Judgment was rendered against the defendants jointly for $493.98 damages, and for costs, and from this judgment both parties appeal.

A. E. Dixon, for the plaintiffs.

For the defendants the cause was submitted on briefs by *R. Sleight.*

WINSLOW J. We shall not consider the question, much discussed in the books, as to whether a county is liable for the torts of its officers committed in the attempted discharge of their corporate duties. In our opinion we do not reach that question, because there is another ground upon which we think it must be held that there is no liability against the county in this case. That ground will be briefly stated. The proposed highway was attempted to be laid out under secs. 1300–1307, R. S. Although the statute refers to highways so laid out as "county roads," examination of the statute reveals the fact that this is, in some sense at least, a misnomer. It is true the road so laid is laid out by the county authorities, but, after all, the question is not whether the highway is laid out by one set of officers or by another, or what the official character or title of such officers may be, but for whom are they acting. Are they acting for the county or for the various towns through which the road runs? Secs. 1303 and 1304 seem to conclusively establish the fact that they are acting for the several towns through which the road is laid. All the damages assessed are to be paid by the towns, and whenever the total amount of damages charged to any town exceeds $1,500 the electors of that town have an absolute veto power upon the entire proceeding so far as that town is concerned. Further, it appears by sec. 1307 that such highways are to be opened and repaired by the respective towns, and the county board has power to open them only in case the town board neglects

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or refuses to do so, and apparently has neither the power to repair the same nor is it under any liability for neglect to do so. R. S. sec. 1308. See, also, R. S. sec. 1339, and *Stilling v. Thorp*, 54 Wis. 528. The conclusion is irresistible that the road becomes, when laid, to all intents and purposes the highway of the town through which it passes, precisely as if laid by the supervisors of the town. If this be so, it seems very clear that the county supervisors, in laying it, are not acting on behalf of the county, but on behalf of the towns. The fact that they are county officers is not a controlling element in the matter. The legislature may undoubtedly authorize county officers to act for a town, and this it seems to us has been done here. Under this view of the law it is evident that no liability was established against the defendant county.

On the plaintiffs' appeal it is clear from the evidence that the finding of the jury that only 100 cords of cordwood were cut and removed by the defendant *McGeehan* is contrary to the great weight of the evidence. The evidence was substantially uncontradicted that a much larger amount of cordwood had been cut. But as this evidence was a mere estimate, made after the wood had been largely removed; we do not feel that it would be just to order judgment, but let the parties present their proofs upon a new trial.

By the Court.—Judgment reversed on both appeals, and action remanded for a new trial

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SELL, Respondent, vs. MISSISSIPPI RIVER LOGGING COMPANY, Appellant.

October 26 — November 13, 1894.

Pleading: Action, tort or contract? Deceit: Demand of judgment: Contract induced by fraud: Performance: Waiver: Evidence: Agency.

1. A complaint alleging the making of a contract by which plaintiff agreed to drive certain logs for defendant for $1,000; that plaintiff was induced to so agree by defendant's false and fraudulent statement, upon which he relied, that the number of the logs did not exceed 8,700; that the actual number thereof exceeded 11,000, and the expense of driving them was thereby greatly increased; that plaintiff drove all of the logs to the place agreed upon; and that a fair and reasonable compensation therefor was $4,000, for which amount judgment is demanded, with interest and costs,— is *held* to state a cause of action for damages for the deceit, and not upon contract, although it demands a judgment proper only in an action on contract.
2. If the defendant was in doubt as to the nature of the action, it should have moved to have the complaint made more definite and certain.
3. It appearing that the plaintiff did not discover, and could not by using due diligence have discovered, the falsity of the representation until the logs were in the river with others in its care, and the drive was in progress, and it was impracticable to abandon them, the completion of the drive was not an affirmance of the contract or a waiver of his right to recover damages for the fraud, measured by what the work was reasonably worth.
4. The question being whether an agent of a corporation induced the making of a contract with it by false representations, evidence of what took place at and before the execution of the contract was admissible to show such false representations.
5. The authority of a person to make a certain contract for a corporation being in issue, a question whether he had received any instruction from the company or any of its officers, agents, or servants to make the contract, was objectionable as being too general in form and as calling for conclusions, and its exclusion was not error where he was allowed to state how he came to make the contract.

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APPEAL from the Circuit Court for *Ashland* County. The complaint alleges, in substance, that March 21, 1893, the defendant, a corporation created for logging and lumbering, had a quantity of pine saw logs in and along the east fork of the Chippewa river, and by its agent entered into an agreement with the plaintiff to drive them below the railroad bridge at Glidden, Wis., and for the purpose of inducing the plaintiff to enter into such contract falsely and fraudulently stated, represented, and guarantied that the number of said logs was 3,700 by actual count and no more; that the logs were then covered up with three or four feet of snow; that, relying on such statement and representation, plaintiff promised and agreed to drive all the said logs lying as aforesaid, having defendant's mark thereon, for the sum of $1,000; that in the spring the plaintiff went with a crew to drive them, and soon thereafter ascertained that the number of the logs greatly exceeded 3,700, and reached the number of 11,617, whereby an increased crew and additional expense were required in driving them; that the inducement to enter into the contract was the representation, statement, and guaranty that the number of logs so to be driven did not exceed 3,700, and the plaintiff relied thereon; that he drove all the logs, 11,617, to the point mentioned, and that the fair, just, and reasonable price and compensation therefor is the sum of $4,000, for which the plaintiff demanded judgment, with interest and costs.

The defendant denied entering into the agreement, and alleged that if the plaintiff drove the logs under a contract it was not made by the defendant. It was further alleged that the plaintiff, July 14, 1893, at Glidden, drew his order or bill on the defendant, requesting it to pay one Schloss, receiver of Schloss, Adler & Co., $670 out of money coming to him for driving said logs; that an action was brought

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to enforce payment of said order by the payee thereof against the defendant, and the same is pending; also, that an action was brought against plaintiff by one Spencer, August 1, 1893, and the defendant was garnished for the sum of $581.90, and the same was still pending.

Upon the trial before the court and jury, a special verdict was found, finding, by direction of the court, the corporate existence of the defendant, and that John Pearl entered into the written agreement for driving the logs of the defendant, in the name of the defendant; that the plaintiff drew the order mentioned in defendant's answer, and the pendency of an action thereon, and of the garnishee suit, as alleged in the answer, as well as that the plaintiff drew another order on the defendant, in favor of Lamoreux, Shea & Wright, for $330, July 14, 1893. The jury found (1) that John Pearl was the duly authorized agent of the defendant, as alleged, when he entered into the contract in question; (2) that it clothed Pearl with authority as its agent, and held him out as such at the time he entered into the contract; (3) that plaintiff entered into the contract with Pearl as defendant's agent, believing him to be such in good faith, and without notice; (4) that Pearl made the alleged false and fraudulent representation; (5) that plaintiff entered into the contract relying thereon and believing it to be true; (6) that the representation was false and fraudulent; (7) that Pearl knew it was false and fraudulent; (8) that the plaintiff could not have found it was false and fraudulent by using due diligence; (9) that the sum due for driving all the logs driven by him, including amounts assigned by him to the persons mentioned in the answer and the Spencer garnishee claim, was $3,606.64.

The court gave judgment on the verdict, deducting the amount of the two orders mentioned in the answer, leaving the amount $2,606.64, for which judgment was given for the plaintiff with costs, and stayed execution until the

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determination of the garnishee action, providing that any sum recovered by Spencer therein should be deducted upon order of the court. The defendant appealed, and assigned various errors, noticed in the opinion, where other material facts are stated.

For the appellant there was a brief by *Jenkins & Jenkins*, and oral argument by *J. J. Jenkins*. They contended, *inter alia*, that having gone on with the work under the contract after discovering the fraud, the plaintiff waived the fraud and cannot recover excepting on the special contract. *Selway v. Fogg*, 5 Mees. & W. 83; *Saratoga & S. R. Co. v. Row*, 24 Wend. 74; *Nounnan v. Sutter Co. Land Co.* 81 Cal. 1. Where a party defrauded brings an action on the contract to enforce it, he thereby waives the fraud and affirms the contract. *Ferguson v. Carrington*, 9 Barn. & C. 59; *Kimball v. Cunningham*, 4 Mass. 502; *Whitney v. Allaire*, 4 Denio, 554; *Lloyd v. Brewster*, 4 Paige, 537.

For the respondent there was a brief by *Rossman & Foster*, and oral argument by *G. P. Rossman*.

PINNEY, J. 1. The contract mentioned in the complaint was in writing, and purported upon its face to have been made between the plaintiff and John Pearl for the defendant, the *Mississippi River Logging Company*, but was signed by Pearl in his individual capacity only, and included all logs having marks owned or controlled by that company and the Chippewa Logging Company; and it was stipulated that the plaintiff was to have the use of all dams and driving improvements of the defendant on the stream, free of charge, for the drive. The contract was in other respects as stated in the complaint. Considerable evidence was produced, bearing upon the question of Pearl's authority as the agent of the defendant to make the contract and represent the defendant in the transaction. There was sufficient evidence to support the verdict, and the motion

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for a new trial, so far as based on the ground that the verdict was contrary to evidence, was rightly overruled.

2. The important question in this case is whether the complaint was rightly regarded by the circuit court as founded on the alleged fraud and deceit, or was on the contract. Objection was taken to the evidence offered and received tending to show fraud in making the contract, and to submitting to the jury the several questions embraced in the verdict on that subject; the defendant contending that the action was upon contract, and that as the plaintiff had assigned to the respective payees of the orders drawn by him on the defendant the entire contract price, $1,000, therefore there could be no recovery in his favor. The complaint is of commendable brevity, but the ambiguity of its allegations as to the nature of the action is such that it is far from being a precedent worthy of imitation. If the defendant had been in doubt as to what the complaint meant, it should have moved to make it more definite and certain; but it chose to take the risk of the construction the court might place upon it at the trial, and has no right to complain that it was surprised thereby. The defendant could easily have guarded against it. We think the court rightly held that the *gravamen* of the charge was fraud and deceit practiced by the defendant on the plaintiff as to the number of logs affected by the contract, and that the terms of the contract are stated by way of inducement, and not as of the substance of the complaint. It then states the making of the false and fraudulent representations to induce the plaintiff to enter into the contract, and upon the truth of which he relied, the increased expenses of the drive, and that the fair and reasonable compensation for driving the 11,617 logs was $4,000, and demands judgment for that amount, with interest and costs. The complaint ought not, we think, to have been held defective at the trial because the plaintiff demanded a judgment which

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was proper only in an action on contract, and which was not a proper way in which to state his claim for damages.

The defendant contends that the plaintiff, having gone on with the work after discovering the fraud, waived it, and could not recover, except the special contract price of $1,000. The evidence tended to show that when the contract was made, owing to the situation of the logs and the great depth of snow, it was impossible to get at the number of them, and that the plaintiff did not discover the fraud until after the logs were in the stream, mingled with large quantities belonging to others then being driven by the plaintiff, when it was impracticable for him to repudiate the contract on the ground of fraud, and in fact not until the drive was progressing and had been nearly completed. The jury, under proper instructions, found that the plaintiff could not have found out the falsity of the representations by using due diligence. It is well established that one who has been drawn into executing a contract by fraudulent representations may affirm the contract after the discovery of the fraud, whether executed or executory, and sue and recover damages therefor; and so, also, when the contract is wholly or partially executed, he may bring his action for the damages, but cannot maintain an action depending for its maintenance upon a rescission of the contract. *Whitney v. Allaire*, 4 Denio, 554; *S. C.* 1 N. Y. 305; *Saratoga & S. R. Co. v. Row*, 24 Wend. 74; *Middleton v. Jerdee*, 73 Wis. 40, 41. This is not inconsistent with what was decided in *Selway v. Fogg*, 5 Mees. & W. 83, where the plaintiff discovered the fraud before entering upon the work, but proceeded to performance, and was not allowed to recover in *assumpsit* as on an implied contract. Whether he might have recovered as for deceit, if he had discovered the fraud after entering upon performance, was not in question in that action, though the court express an opinion against a recovery in such a case.

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In the present case the plaintiff had no option, for when he discovered the fraud the logs, with others, were in the river under his care, and the drive was in progress and it could not be stopped. He could not safely abandon them, and it was impracticable to do otherwise than complete the drive. There could be no valid contract until it was ratified with a knowledge of the fraud; and if a party affirms a contract with knowledge of the fraud, he affirms it wholly, but not as a contract made in good faith. He does not thereby waive his claim for the damages caused by the fraud. *Whitney v. Allaire*, 1 N. Y. 311, 312. In order to constitute a waiver, "there must be something equivalent to a ratification of the contract after discovery of the fraud; and this may be either by acts of express recognition of its binding force, or by allowing the other party to proceed upon it and change his position, or by the intervention of the rights and interests of innocent third persons. He may still bring an action for the damage sustained by being drawn into the contract." Bigelow, Fraud, 188. In Cooley, Torts, 505, it is said that: "Fraud may be waived by an express affirmance of the contract. Where an affirmance is relied upon, it should appear that the party having a right to complain of the fraud had freely, and with full knowledge of his rights, in some form clearly manifested his intention to abide by the contract and waive any remedy he might have had for the deception."

The only ground of ratification of the contract or waiver of the fraud relied on is the fact that after the plaintiff discovered the deception, and when abandonment of the contract was impracticable and could not have been resorted to without violation of the plaintiff's obligations to others, by reason of the circumstances stated, he completed the drive. He immediately after insisted on compensation upon the basis of what the work was reasonably worth. We think that his completion of the drive, under such cir-

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cumstances, was not an affirmance of the contract nor a waiver of his right to damages by reason of the fraud, and that, the contract having been induced by fraud, it is no obstacle to the recovery in this action of his damages, to be measured by what the work was reasonably worth. The complaint states the entire case substantially as made out, and, as the distinctions between forms of action have been abolished, we do not perceive any substantial objection to the allowance of damages on this basis. This rule was adopted in the equitable action of *assumpsit* under similar circumstances. *Bush v. Brooks*, 70 Mich. 446.

It was not error for the court to direct the jury to find that Pearl made the contract in question in the name of the defendant, for this really appears on its face. It was left to the jury, under proper instructions, to find whether he had any authority to do so; and evidence of what took place at and before the contract was executed, to show the fraudulent representation relied on, was rightly admitted. The two orders drawn by the plaintiff on the defendant were, in terms, express assignments to the parties in whose favor they were drawn of the amount due him therein named, and the plaintiff had judgment for the remainder of the damages, subject to the result of the garnishee action.

3. It was argued as error that the court refused to permit the witness Pearl to answer, against plaintiff's objection, whether he received any instructions from the *Mississippi River Logging Company*, or any of its officers, agents, or servants, to make the contract in question. The trial judge said, in substance, that he thought that was a litigated question, and the jury should pass on it; and he sustained the objection, saying to the witness, "You need not detail any conversation between you and Mr. Houston, but you can state generally how you came to make the contract." The witness then stated: "Mr. Houston came

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to me, and said he had seen Mr. Weyerhauser [who was, it appears, the president of the company]. I came to make the contract on representations of Mr. Houston. I never talked with Mr. Weyerhauser about it." Houston was a witness, and testified fully at the trial. We think the question was too general in form, and to some extent calling for conclusions rather than facts; but we cannot see that the court improperly restricted the scope of the inquiry, to the prejudice of the defendant.

These remarks cover all the assignments of error to which the argument extended, and we find that none of the errors relied on furnishes cause for reversing the judgment.

By the Court.— The judgment of the circuit court is affirmed.

KENTZLER, by guardian *ad litem*, Respondent, vs. THE AMERICAN MUTUAL ACCIDENT ASSOCIATION OF OSHKOSH, WISCONSIN, Appellant.

October 26 — November 13, 1894.

Accident insurance: Notice and proofs of death: "Immediately."

An accident policy provided that notice of any claim should be given *immediately* after the accident occurred; that proof of death, in like manner and time, should be verified by the attending physician or some other person having personal knowledge of the fact; that unless positive proof of death or injury should be furnished within six months of the date of the accident all claims should be forfeited; and that the insurance should not cover disappearances. The insured, a tugboat engineer, disappeared November 9, 1892. Shortly after, the bay in which the boat lay was frozen over, and on April 19, 1893, when the ice broke up, his body was found in the bay near the boat. Search was immediately made for his daughter, the beneficiary in the policy, who lived in another state, but she did not learn of her father's death until May 24, 1893, when she at once

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gave notice thereof to the company, and on July 12, 1893, furnished proofs of death. *Held*, that there was a sufficient compliance with the requirements of the policy. The word "immediately" is construed to mean such convenient time as was reasonably requisite for giving the notice after discovery of the death; and the proofs were to be furnished within the six months specified after such discovery.

APPEAL from the Circuit Court for *Ashland* County.

About 1886 the parents of the plaintiff, *Emma Kentzler*, had separated at or near Detroit, Mich., and always thereafter continued to live separate. *Emma* and her mother remained in Michigan, but her father, Joseph Kentzler, went to Ashland in this state, and in 1892 he was employed as an engineer of a tugboat operated by the Ashland Brown Stone Company on Chequamegon Bay, under Capt. John Herbert, who, with the engineer, fireman, and steward, made up the crew, and all lived and slept on the tug. On September 20, 1892, the said Joseph Kentzler became a member of the defendant association, and obtained from it a certificate of membership, containing, among other things, the following:

"*The American Mutual Accident Association of Oshkosh, Wisconsin*, in consideration of the membership fee and the warranties and agreements contained in his application for membership, hereby accepts Joseph Kentzler, of Ashland, Wisconsin, being a stationary engineer, under classification 'C,' and insures him against injuries through external, violent, and accidental means for five years, subject to its by-laws, in a manner and upon the conditions following: . . . (5) Or if such injury shall cause the death of such member within ninety days, will pay $1,500 to *Emma Kentzler*, daughter, or, in event of her prior death, to the legal representative of such member.

"The conditions upon which this certificate is issued and accepted by the insured member are as follows: . . . 2. That notice in writing of any claim made shall be given

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the secretary of the association, at Oshkosh, Wisconsin, with full particulars of the accident and injury, immediately after the accident occurs. Proof of death, in like manner and time, shall be verified by the attending physician or some other person having personal knowledge of the fact; and unless positive proof of death or injury and duration of disability, and that the same resulted from bodily injuries covered by this insurance, shall be furnished to the association within six months of the date of the accident, then all claims thereon shall be forfeited. All claims shall be subject to proof of insurable interest, and payable within ninety days after proof of the injury. . . . 6. . . . No proceedings at law or in equity shall be brought, or arbitration required, to recover any sum hereunder, unless the same is commenced within one year from the date of the alleged injury. . . . 8. The provisions and conditions herein, and those of the application herefor, are precedent to the issuing of this certificate and its validity. . . . 9. This insurance does not cover disappearances, nor injuries of which there is no visible mark upon the body, nor death nor injury resulting wholly or in part, directly or indirectly, from any of the following causes: [Causes specified, none of which were present here.]"

On the same day said certificate was issued, the said Joseph Kentzler delivered the same to the said Capt. Herbert.

On November 9, 1892, the tug lay next to a scow in the bay at Ashland. In going onto the tug persons stepped from the scow to the tug without any plank or walk, and without any difficulty. About 11 o'clock in the evening of that day the said Joseph Kentzler was last seen at the St. Charles Hotel at Ashland, and started from there, apparently to go to said tug. He was missed the next morning, and search made for him without avail. There was no ice in the bay at the time. A couple of days afterwards

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the captain made a trip with the tug, but returned November 12 or 13, 1892, and placed the tug in the same place, next to the scow. On April 19, 1893, the ice in the bay broke up, and the body of said Joseph Kentzler was found in the bay between the tug and the scow. Search was immediately instituted for the said *Emma* by advertising in the Detroit papers, and making inquiries by letter of numerous officers and persons in Michigan. In the early part of May, 1893, it was ascertained that she was in New Haven, Mich. She did not learn of her father's death until May 24, 1893, when she received information of the same at New Haven, Mich. Thereupon she immediately notified the secretary of the defendant of her father's death. The defendant received such notice May 26, 1893. On July 12, 1893, *Emma* duly served and delivered to the defendant's secretary, at Oshkosh, proofs of her father's death, as prescribed in the policy, and demanded payment thereon. On October 28, 1893, through her guardian *ad litem*, Nechtges, she commenced this action to recover the amount of such insurance.

The complaint contains allegations of the facts stated, in the usual form. The defendant answered by way of admissions and denials, and, among other things, alleged that the plaintiff did not give immediate notice of the injuries causing the death of the insured, nor give proof of death, as required by the terms of the contract; that on or about July 14, 1893, the defendant received by mail what purported to be proofs of death of the insured, and notice of the fact that he had been drowned; but that said papers were returned with the following indorsement: "These papers returned, not served within the time required by the contract. W. B. Hobart, Secretary."

At the close of the trial the court refused to grant a nonsuit or to direct a verdict in favor of the defendant: and thereupon the jury, by the direction of the court, re-

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turned a verdict in favor of the plaintiff, and assessed her damages at $1,500, with interest from October 12, 1893. From the judgment entered thereon, the defendant appeals.

M. C. Phillips, for the appellant, to the point that the sudden character of the death, occurring at night and unknown to any one, and resulting in instantaneous death, was not a legal excuse for not giving the proofs within the provisions of the certificate, cited *Gamble v. Acc. Ass. Co.* Ir. Rep. 4 C. L. 204; *Patton v. Employer's L. Ass. Corp.* L. R. 20 Ir. 93; May, Ins. § 465; Cooke, Life Ins. § 115; *Blakeley v. Phœnix Ins. Co.* 20 Wis. 205.

For the respondent there was a brief by *Rossman & Foster*, and oral argument by *Geo. P. Rossman*. To the point that if a notice is given with due diligence and without unnecessary delay it will meet the requirements of the rule requiring "immediate" notice, they cited May, Ins. §§ 462, 465, 536; Cooke, Life Ins. § 115; *Ins. Co. of N. A. v. Brim*, 111 Ind. 282; *N. Y. Cent. Ins. Co. v. Nat. P. Ins. Co.* 20 Barb. 475.

CASSODAY, J. It may be fairly inferred from the circumstances attending the disappearance of Mr. Kentzler on the evening of November 9, 1892, and the finding of his body in the water of the bay, April 19, 1893, as mentioned in the foregoing statement, that as he went from the hotel to the tug for the purpose of retiring, and while in the act of stepping from the scow to the tug, he accidentally fell between the two into the water below, and was drowned. He was at the time about forty-six years of of age, in good health, and apparently sober, although he had taken a drink of whisky while at the hotel, and it is said that he was in the habit occasionally of having a "spree." By the express terms of the contract, it did "not cover disappearances." This being so, it is very manifest that had notice of his dis-

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appearance been given to the defendant's secretary November 10, 1892, and proofs of the circumstances under which he disappeared, with the suggestion that he had probably been drowned in the bay, been made out and sworn to and delivered to the secretary five months after Kentzler's disappearance, yet the defendant in all probability would have answered, in the language of the contract: "This insurance does not cover disappearances," and hence you have no claim against the association. Such was the contract,—that the defendant was subject to no liability "unless positive proof of death" was made within the time and in the manner prescribed in the certificate. But it was utterly impossible to make such proof or give such notice until the body was discovered and identified, April 19, 1893. That was nearly six months after Kentzler had, in all probability, lost his life. Up to the time of such discovery and identification, the beneficiary was in no default, and under no obligations to give such notice or furnish such proofs. But the contract expressly required notice to be given, "with full particulars of the accident and injury, *immediately* after the accident occurs." It also expressly required that "proof of death, *in like manner and time*, shall be verified by the attending physician or some other person having personal knowledge of the fact; and unless *positive* proof of death . . . shall be furnished to the association within six months of the date of the accident, then all claims thereon shall be *forfeited*."

A contract should not be construed so as to forfeit or render nugatory the rights of one of the parties to it, unless the language employed imperatively requires such construction. In other words, an interpretation which gives effect is preferred to one which makes void. Besides, a contract should be interpreted in view of the conditions necessarily implied by law. It is a maxim in the law that "all words, whether they be in deeds, or statutes, or other-

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wise, if they be general, and not express and precise, shall be restrained unto the fitness of the matter and person." *Webster v. Morris*, 66 Wis. 395; *Lessee of Brewer v. Blougher*, 14 Pet. 198. When the ordinary meaning of the words employed leads to a manifest absurdity or repugnance, they may, if the instrument as a whole will permit it, be varied or modified so as to avoid such inconvenience, but no further. *Becke v. Smith*, 2 Mees. & W. 195; *Turner v. S. & R. R. Co.* 10 Mees. & W. 434. In the case at bar the contract must have a reasonable construction, and in view of the conditions so implied by law.

What is the object of giving such notice of the accident, injury, or death? In case of an injury or disability not resulting in death, such notice affords the association an opportunity to ascertain the exact condition of the person and apply the most effectual remedy. But in case of death there can be no remedy, and the only object of the notice is to secure evidence of identity. What is meant by giving notice "immediately after the accident occurs"? Does it mean, in the language of Webster: "In an immediate manner; without intervention of anything; . . . without interval of time; without delay; instantly"? If the contract is to be thus literally construed, compliance by the beneficiary would seldom be possible. But courts, looking at the substance of contracts and statutes, have, during the last two centuries, repeatedly declared that: "The word '*immediately*,' although in strictness it excludes all mean times, yet, to make good the deeds and intents of parties, it shall be construed *such convenient time as is reasonably requisite for doing the thing*." 9 Am. & Eng. Ency. of Law, 931, citing numerous English and American cases in support of the proposition. The same language is quoted approvingly by RYAN, C. J., speaking for the whole court, in construing the words "immediate delivery," as used in sec. 2310, R. S., in *Richardson v. End*, 43 Wis. 318.

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Stevens v. Breen, 75 Wis. 599. Applying this rule to the case at bar, the word "immediately" must be construed to mean such convenient time as was reasonably requisite for doing the thing required. That is to say, upon the discovery of the death notice thereof was to be given in such convenient time as was reasonably requisite for doing so under the circumstances mentioned; and the proofs were to be furnished within the six months specified after such discovery. Besides, it is a maxim that the law does not require impossibilities. Thus, in the language of HENNEN, J., "where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens." *Baily v. De Crespigny*, L. R. 4 Q. B. Cas. 185. To the same effect, *Taylor v. Caldwell*, 3 Best & S. 826; *Howell v. Coupland*, L. R. 9 Q. B. Cas. 462; *S. C.* on appeal, 1 Q. B. Div. 258; *Insurance Cos. v. Boykin*, 12 Wall. 433.

In the light of reason as well as the authorities, we must hold that the action was not barred by the stipulation in the contract.

By the Court.— The judgment of the circuit court is affirmed.

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DUTHIE, Respondent, vs. THE TOWN OF WASHBURN, Respondent, and PROBERT, Appellant.

October 27—November 13, 1894.

Injury from defective highway: Primary liability of individual: Reversal of judgment against town: New trial: Parties.

In an action against a town for injuries caused by a defective highway, the town alleged that one P. was primarily liable, and he was made a defendant. The verdict was for the plaintiff against the town and in favor of P., but the judgment entered thereon did not in terms affect P. The town moved for a new trial on the ground, among others, that in finding P. not liable the verdict was contrary to the evidence. The motion was denied, and the town appealed from the judgment. P. was heard on the appeal. The judgment was reversed for errors not relating to the questions between P. and the town, and the cause was remanded for a new trial. *Held*, that this meant a new trial as to all the parties and all the issues.

APPEAL from the Circuit Court for *Bayfield* County.

The action is for damages for personal injuries from a defective highway in the defendant town. The appellant, *Probert*, was made a party defendant upon claim made by the town that he was primarily liable for the damages. There was a trial in the circuit court, which resulted in a verdict against the town on plaintiff's cause of action, and in favor of *Probert* that he was not primarily liable. There was a motion for a new trial on the minutes of the court, on several specified grounds, of which one was: "(8) For the reason the verdict is contrary to the evidence in so far as it finds no cause of action against the defendant *Probert*." The motion was denied. Judgment was entered upon the verdict against the defendant town, which did not include a judgment in any way affecting *Probert*. The town appealed from the judgment, but did not serve notice of appeal upon *Probert;* yet *Probert* was represented and took part in the trial of the appeal in this court. This court re-

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versed the judgment for errors in the charge of the court which did not relate to the questions between *Probert* and the town (87 Wis. 231), and remanded the cause for a new trial.

After the record had been remitted to the circuit court, *Probert* moved for an order "that when the final judgment shall be entered in said action it shall provide that the said impleaded defendant, *A. C. Probert*, is not liable to the plaintiff in said action, and is not primarily liable for any injuries sustained by plaintiff, and is entitled to costs," and "that said verdict stand so far as it affects the rights of said defendant." The court denied the motion, set aside the verdict, and ordered a new trial. From this order the defendant *Probert* appeals.

The cause was submitted for the appellant on the brief of *Lamoreux, Gleason, Shea & Wright;* for the respondent *Duthie* on that of *Tomkins & Merrill;* and for the respondent town on that of *J. J. Miles* and *E. C. Alvord.*

NEWMAN, J. The circuit court, before the entry of judgment upon the verdict, should have set aside the verdict and have granted a new trial, on the motion of the defendant the town of *Washburn.* That is settled by the decision of this court. *Duthie v. Washburn*, 87 Wis. 231. *Probert* was a party to that motion. He was at least, if not a party, a privy, to the appeal. He had a right to be heard upon the appeal. *Hunter v. Bosworth*, 43 Wis. 583, 590. He was heard by his counsel on the argument before this court. He had his day in court upon the appeal. The judgment was reversed, and the cause remanded for a new trial in the circuit court. This is construed to mean and intend a new trial as to all the parties and as to all the issues involved between the parties. This construction is proper, and perhaps necessary, in order to prevent inconvenience, and perhaps injustice, by discharging *Probert* from the ac-

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tion before the rights of all the parties are settled and determined. It is the policy of the law, in this class of actions, to require the plaintiff to enforce his remedies against the party who is primarily or ultimately liable for his damages. And he may be required, in a proper case, to join such party as a defendant with the municipality. Laws of 1889, ch. 471; *Hiner v. Fond du Lac*, 71 Wis. 74. In order to insure complete justice and avoid inconvenience, he should remain a party until the ultimate rights of all the parties are finally settled and determined. This court, on the former appeal, had power to direct the circuit court to do what it should have done before,— to set aside the verdict and grant the motion for a new trial. This it in effect did. "Upon an appeal from a judgment . . . the supreme court may reverse, affirm, or modify the judgment . . . as to any or all of the parties; and may, if necessary or proper, order a new trial." R. S. sec. 3071.

By the Court.— The order of the circuit court is affirmed.

THE STATE EX REL. MOORE, Appellant, vs. THE MAYOR AND COMMON COUNCIL OF THE CITY OF ASHLAND, Respondents.

October 27 — November 13, 1894.

Municipal corporations: Street improvements: Special assessments: Charter construed.

The city charter of Ashland provides (Laws of 1889, ch. 27, subch. 17) that the expense of paving streets may be charged to abutting lots in proportion to the benefits accruing thereto; that before the work is ordered the board of public works shall ascertain the entire cost, and determine the amount of damages and benefits accruing to each lot, and file a report thereof; that after hearing objections they shall make and file a corrected report, which may be mod-

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ified by the common council, and when it has been finally confirmed by that body a notice shall be published that a final determination as to the benefits to be assessed has been made; that appeals from such determination may be taken by any person aggrieved; that bids shall be advertised for and the contract let by the board of public works; and that after the work is done the "contractor shall be entitled to a certificate therefor as to each parcel of land against which benefits shall have been assessed for the amount chargeable to said lot." *Held*, that both the preliminary assessment and the final determination of the benefits are to be made before the contract is let or the work done; and an assessment made after the contract had been performed, charging the entire cost of the work (considerably greater than the estimated cost) to the abutting lots, apparently by the front-foot rule, without determining that they were benefited in any amount, is void.

APPEAL from the Circuit Court for *Ashland* County.

Certiorari to review special assessment proceedings. The facts are stated in the opinion. The appeal is from a judgment affirming the assessment.

For the appellant there was a brief by *J. J. Miles*, and oral argument by *A. L. Sanborn* and *Mr. Miles*. They argued, among other things, that the charter requires that the final assessment of benefits should be determined by the board of public works and confirmed by the council before the work is ordered at the expense of the abutting property. *Massing v. Ames*, 37 Wis. 645. The assessment in question was made after the work was done, and assesses the cost of the improvement in front of each lot according to the front-foot rule, without regard to the damages or benefits. Such an assessment is void. *Pound v. Chippewa Co.* 43 Wis. 63; *Hall v. Chippewa Falls*, 47 id. 267; *Warren v. Grand Haven*, 30 Mich. 24, 30; *Mills v. Detroit*, 95 id. 422; *Morrison v. Chicago*, 142 Ill. 660; *Myrick v. La Crosse*, 17 Wis. 442; *Kneeland v. Milwaukee*, 18 id. 411; *Gilman v. Milwaukee*, 61 id. 588; *Chicago v. Larned*, 34 Ill. 203; *Chicago v. Baer*, 41 id. 310; *State v. Hudson*, 29 N. J. Law, 104; *Chamberlain v. Cleveland*, 34 Ohio St. 566.

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For the respondents there was a brief by *Geo. P. Rossman*, attorney, and *Lewis & Briggs*, of counsel, and oral argument by *H. M. Lewis*. They contended, *inter alia*, that a fair construction of the charter contemplates, *first*, a preliminary and approximate determination by the board of public works of the benefits and damages to the abutting property, the cost of which is to be charged to such property, as a guide to the common council in determining whether or not it is expedient to order such improvement; *second*, a further and final determination of such benefits and damages afterwards; and this final determination may be made, not only after the work is ordered, but more properly after the contract is let, as such contract forms an exact basis for calculating the cost and determining the benefits, etc.

WINSLOW, J. The relator sued out a writ of *certiorari* to review and reverse certain special assessment proceedings whereby a special assessment had been charged against his lots in the city of Ashland for the paving of the street in front of the lots. The action was tried upon the return to the writ made by the city clerk. Numerous irregularities in the proceedings were relied on by the relator to substantiate his contention. We shall discuss but one of these irregularities, which seems to us fatal to the assessment.

The steps necessary to make a valid assessment for the paving of a street against abutting lots are found in ch. 17 of the charter of the city of Ashland. Laws of 1889, ch. 27. The provisions are, in brief, that streets may be paved, and the expense charged to abutting lots *in proportion to the benefits* accruing to the lots; that before any street is ordered to be paved the board of public works shall view the premises, ascertain the entire cost, and determine the amount of damages and benefits accruing to each abutting lot, and file a report showing these facts in their office; that they

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shall give notice by publication that such report is open for review at their office, and will so remain for twenty days, and appoint a time for hearing objections thereto; that after such hearing they shall make their final and corrected report, and file the same with the city clerk; that this report shall be laid before the common council at their next regular meeting, and may be confirmed or corrected or referred back to the board for further consideration, and when finally confirmed the city clerk shall give notice by publication that a final determination as to the benefits to be assessed against abutting real estate has been made; that appeals may be taken from such determination by any person aggrieved; that bids shall be advertised for by the board of public works, and the contract let by the board; that, after the contract has been completed to the approval of the board, "the contractor shall be entitled to a certificate therefor as to each parcel of land against which benefits *shall have been assessed* for the amount chargeable to said lot." Further provisions are contained in the chapter, as to the issuance of improvement bonds, which are not necessary to be stated.

The plain and necessary import of these charter provisions is that lots are to be assessed for the proposed paving in proportion to the benefits accruing to them; that before any contract is made a preliminary assessment is to be made, reviewed, and corrected by the board of public works, reported to the council, and confirmed or modified and finally determined by the council. All these steps are plainly to be taken before the contract for the work is made or the work done. In the present case it appears from the return, not only that no preliminary assessment by the board of public works is on file or can be found in the office of the city clerk, but that the common council never attempted to make or determine any assessment against any lots until the year following the inception of

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the proceedings, after the contract had been fully performed. At this time the council attempted to make an assessment charging the entire cost of the work (which was considerably greater than the estimated cost) to the abutting lots, apparently on the front-foot rule, without determining that the lots were benefited in any amount. These defects in the proceedings are glaring, and fatal to the assessments. *Myrick v. La Crosse*, 17 Wis. 442; *Kneeland v. Milwaukee*, 18 Wis. 411.

By the Court.— Judgment reversed, and action remanded with directions to enter judgment for the relator vacating the assessment against his lots, in accordance with this opinion.

KOCH, Respondent, vs. THE CITY OF ASHLAND, Appellant.

October 27 — November 13, 1894.

Municipal corporations: Injury from falling on icy sidewalk: Instructions to jury.

1. Where the evidence was sufficient to support a verdict for the plaintiff, it was not error for the court to say, in charging the jury, that the evidence of the plaintiff tended to sustain his cause of action.
2. In an action for injuries sustained by falling on an icy sidewalk, which, it was claimed, the plaintiff knew was dangerous, an instruction that the jury must find, if they returned a verdict for the plaintiff, that there was no negligence on his part contributing to the injury; that he was not bound to use extraordinary care; and that if he used ordinary care, or such care as a man of ordinary care, prudence, caution, and judgment would have used under the circumstances of the case, he was not guilty of contributory negligence,— is *held* to have stated the rule with approximate correctness and sufficient clearness. If the defendant desired a more definite or explicit instruction, it should have been asked.
3. An instruction, in such case, "that if the defect had existed for such a length of time that the city authorities, by the use of due dili-

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gence, which the law imposed, might have learned of the unsafe condition of the walk, they were charged by the law with notice the same as if actually served upon them or the plaintiff had notified them before he was injured; and after ascertaining the facts they would have a sufficient time to remedy the defect. They should use sound discretion, and use most diligence in the most populous parts of the city," — is *held* not erroneous.

APPEAL from the Circuit Court for *Ashland* County.

Action to recover damages to the plaintiff by falling on an icy sidewalk. Snow had been permitted to remain and accumulate upon the sidewalk until the travel over it had formed a ridge twelve to fourteen inches high, which was rough and slippery. The street was in a similar condition. The walk had been in substantially the same condition from about Christmas of 1891 to January 12, 1892, the time of the plaintiff's accident. There had been a thaw the day before the accident, and a freezing the night before. The plaintiff slipped and fell and was injured. There was a verdict and judgment for the plaintiff, from which the defendant appeals.

For the appellant there was a brief signed by *Geo. P. Rossman*, city attorney, and *J. J. Miles*, of counsel, and the cause was argued orally by *Mr. Miles*. They contended, *inter alia*, that the defendant was guilty of contributory negligence in voluntarily and unnecessarily passing over a sidewalk which he knew to be dangerous. Knowing the danger, he was bound to exercise care proportionate thereto, and the instruction that he was only required to use ordinary care was erroneous. *Hausmann v. Madison*, 85 Wis. 187; *Bloomington v. Rogers*, 36 N. E. Rep. 439; *Morrison v. Shelby Co.* 116 Ind. 431; *Beatrice v. Reid*, 59 N. W. Rep. 770; *McGuinness v. Worcester*, 160 Mass. 272; *Cosner v. Centerville*, 57 N. W. Rep. 636; Sackett, Inst. to Jur. 367.

For the respondent there was a brief by *Sanborn, Dufur & Anderson*, and oral argument by *A. W. Sanborn*.

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NEWMAN, J. It is claimed that the court erred in denying motions for a nonsuit, for the direction of a verdict for the defendant, and for a new trial. These motions were all based upon the theory that the evidence was insufficient to support a verdict for the plaintiff. But there was testimony on all controverted points sufficient to support a verdict for the plaintiff, if believed by the jury. And the proper inferences to be drawn from undisputed facts were debatable. On the whole case, the testimony was sufficient to be submitted to the jury and to sustain the verdict which it returned.

Numerous exceptions are taken to the charge which the court gave to the jury. These exceptions seem to lack in discrimination and care. They are, in the main, to detached portions of the charge, and to sentences which are not always fairly indicative of the character of the instructions considered as a whole. On the whole, the charge seems to have presented the questions involved fairly and with a fair degree of clearness and precision. Some of these exceptions will be noted specially, in order to show their quality. For example, this: "The court erred in that part of its charge, in folio 54, stating that the evidence of the plaintiff tends to sustain his cause of action. Such a statement was an improper comment on the testimony." It might be difficult in sober seriousness to answer that objection, after holding the evidence sufficient to support the verdict. Again: "The plaintiff was familiar with the walk, and testified that he knew it was dangerous, and the charge that he was only required to use ordinary care was erroneous. The court should have instructed the jury that the plaintiff was obliged to use care commensurate with the obvious peril." The court did charge the jury: "You must find, if you return a verdict for the plaintiff, that there was no negligence on his part contributing to the injury of which he has complained. He was not bound to use extraordinary care. If he used ordinary care, or such

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care as a man of ordinary care and prudence, caution, and judgment would have used under the circumstance of this case, he is not guilty of contributory negligence, under the law." That seems to state the true rule with approximate correctness and sufficient clearness for the apprehension of ordinary jurors. If the defendant desired a more definite or explicit instruction, it should have been asked. Again, the jury were told "that if the defect had existed for such a length of time that the city authorities, by the use of due diligence, which the law imposed, might have learned of the unsafe condition of the walk, they were charged by law with notice the same as if actually served upon them or the plaintiff had notified them before he was injured; and after ascertaining the facts they would have a sufficient time to remedy the defect. They should use sound discretion, and use most diligence in the most populous parts of the city." The precise difficulty with this instruction is not clearly pointed out. While it may not be, in all respects, perspicuously clear, it does not appear to be capable of seriously misleading. Certainly, it was the duty of the proper officers to give due attention to the condition of the sidewalks, in order to ascertain if defects exist, and probably this is more important in the most populous parts of the city. And if the unsafe condition had continued so long as that, if they had given it reasonable attention, they must have discovered its condition, then they had notice of its condition to the same effect, in law, as if a written notice of it had been served upon them. It was their duty to remedy the defect within a reasonable time. And that seems to be fairly the substance of this instruction. This defect was easily discoverable and readily remediable.

The question of the plaintiff's contributory negligence seems to have been fairly submitted. No error is found for which the judgment should be reversed.

By the Court.—The judgment of the circuit court is affirmed.

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THE CITY OF ASHLAND, Respondent, vs. WHEELER, Appellant.

October 29 — November 13, 1894.

Municipal corporations: Grant of franchise to water company: Repeal or alteration: Regulation of rates: Collateral inquiry as to validity of grant.

1. Ordinances passed by a town board granted to a corporation a franchise to furnish water for an unincorporated village within the limits of the town. Afterwards the village became a city, and an ordinance thereof granted and confirmed to the corporation all the rights and franchises conferred by said town ordinances (which were incorporated in and made a part of the city ordinance), subject to certain modifications. The city ordinance also fixed the rates which the corporation might charge, and provided that, when accepted, it should constitute a contract between the city and the corporation. *Held*, that if the town ordinances were invalid because enacted without authority, they became valid as a part of the city ordinance, which was authorized by its charter, and the latter ordinance, upon acceptance of its conditions, became a valid contract between the corporation and the city.
2. In the absence of an express delegation of such authority, the common council of the city had no power to repeal, alter, or impair such franchise or contract; and an ordinance attempting to reduce the rates which the corporation might charge was invalid.
3. The amended charter of Ashland,— providing (in subch. 11, ch. 27, Laws of 1889) that "whenever the waterworks shall be owned by the city, the same shall be operated under the direction of the board of public works," and that "the common council shall have power to legislate on all matters with reference to the construction, operation, management, and protection of the waterworks of the city, not contravening the provisions of this act, or the constitution or laws of this state, or contracts already made," etc.,— gave the common council no power to alter or repeal a franchise theretofore granted to a water company.
4. The validity of the grant of a franchise to a water company cannot be questioned collaterally, in a prosecution of one of its officers for the collection of excessive rates, on the ground that a member of the city council, whose vote was necessary to pass the granting ordinance, was a stockholder in the company, or that the rentals to be paid by the city constituted a debt in excess of the constitutional limit.

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5. If an ordinance granting a franchise to a water company and the contract resulting from its acceptance are void, a subsequent ordinance attempting to alter the rates which the company is allowed to charge for furnishing water can have no validity, since in that respect neither the city nor the company owes any duty to the other.

APPEAL from the Circuit Court for *Ashland* County.

The defendant was prosecuted for wilfully and unlawfully exacting and receiving, as a servant and agent of the Ashland Water Company, a corporation of the city of *Ashland*, from James Anderson, a person whom it was bound to furnish with water for residence purposes in said city, an amount in excess of the established rates as fixed by secs. 1, 2, 3, and 4 of an ordinance of said city, entitled "An ordinance to establish and fix the rate or rates to be charged by the Ashland Water Company to its consumers under their franchise," to wit, the sum of $10 for a semi-annual payment, when the rate fixed by said ordinance was $5.25, contrary to the charter and ordinances of the city, etc. The answer of the defendant was a general denial. Upon trial before the court and jury, a verdict of guilty was given against the defendant, and it was adjudged that he pay a fine of $10 and costs, from which he appealed.

The defendant admitted the receipt by him, as superintendent of the Ashland Water Company, of $10 from Anderson for the semi-annual payment for furnishing said Anderson at his residence in said city of *Ashland* (an eight-room house, with closet), with water for the same; and the material question was whether the rate therefor was governed by the provisions of the ordinance mentioned in the complaint, enacted August 22, 1893, or by prior ordinances passed by the town board of Ashland, conferring upon the Ashland Water Company its franchise of furnishing the village of Ashland with water, and fixing the rates therefor, etc., and which had been combined into one ordinance

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and adopted and enacted by the common council of the city of *Ashland*, August 2, 1887. The water company constructed and operated its works and furnished water to the village, and afterwards city, of *Ashland*, under these ordinances, until the ordinance mentioned in the complaint was enacted.

The town of Ashland included the unincorporated village of that name, containing more than 1,000 inhabitants when the franchise was granted to the water company, and became incorporated as a city in April, 1887. The town had passed various ordinances which purported, by their terms, to be contracts between it and the Ashland Water Company as to the rates for furnishing water to the village and to its inhabitants; and this franchise, it was originally stipulated, should be perpetual; and all rights, privileges, and franchises secured to the water company by the former ordinances were granted and secured to it by the city ordinance, subject to certain modifications, with the same effect "as if all the said ordinances had been duly passed and adopted from time to time by the mayor and council of the city, after its organization." By the terms of this city ordinance the franchise was limited in duration to fifty years, and the water company agreed to provide and supply water to the city of *Ashland* and its inhabitants for fire protection and domestic purposes for the term of fifty years, the city agreeing to pay for the fifty-four pay fire hydrants already established at the rate of $100 each per annum, and the water company agreeing to furnish eight free fire hydrants in addition thereto, and the city agreeing to pay for the next forty-six pay fire hydrants from time to time, at the rate of ten per mile on future extensions, at the rate of $60 each per annum, and for all pay fire hydrants in excess of the number of 100 located from time to time, at the rate of ten per mile on future extensions, at the rate of $50 each per annum, and to annually

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levy and collect a tax to meet the payment for all hydrant rentals under such ordinance. One of the ordinances so consolidated in and adopted by said city ordinance further provided that the water company, its successors and assigns, should not charge to consumers during the continuance of their franchise exceeding certain rates set out in a schedule made a part thereof, and by which such rates were to be collected in semi-annual instalments in advance, but that a meter might be inserted, at the discretion of the company, and the consumers supplied and charged at meter rates. It was provided by said ordinance for a written acceptance thereof by the Ashland Water Company, and thereupon the ordinance so accepted should constitute the contract and be the measure of the rights and liabilities of the city of *Ashland* and of the Ashland Water Company, its successors and assigns; and it was further provided that the mayor and city clerk should, upon such acceptance, seal duplicate copies of the ordinance with the seal of the city, and sign the same in the name and on behalf of the city, and deliver one of them, so sealed and signed, to the Ashland Water Company, and to receive the other in behalf of the city when signed and sealed by the water company, and to cause such copy and acceptance to be recorded in the office of the recorder of deeds of Ashland county. Evidence was given tending to show the acceptance of the ordinances by the waterworks company, and also by the city of *Ashland.*

The subsequent city ordinance of August 22, 1893, mentioned in the complaint, established and fixed the rate or rates to be charged by the Ashland Water Company to its consumers under its franchise at substantially fifty per cent. of the rate stipulated and fixed by the original ordinance, and provided, among other things, that it should be "unlawful for the water company, its servants, agents or employees, to charge, exact or receive from any consumer,

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person or persons to whom they may or shall furnish water in the city of *Ashland* an amount in excess of the rate herein established and fixed; . . . and that any corporation, association, person or persons who shall violate this ordinance, or any part thereof, shall on conviction be punished by payment of a fine of not less than $10 nor more than $100, and by imprisonment in the city jail not less than thirty days nor more than six months, or both such fine and imprisonment, in the discretion of the court." The fifth section provided that "all ordinances or parts of ordinances in conflict with this ordinance are hereby repealed." The annual rate for supplying Anderson with water would be $20 under the original ordinance, but under the ordinance of August 22, 1893, it would be about $10.

The city of *Ashland* was incorporated upon the same territory as the village of Ashland, by ch. 127, Laws of 1887; and in 1884, when the first ordinance was adopted, the village had between 2,000 and 3,000 inhabitants. The water company built its works in 1884, at an expense of at least $100,000, and subsequently expended $100,000 in extensions and improvements, and from that time down to the present furnished water to the town and its successor, the city, and the inhabitants thereof. John H. Knight, a stockholder of the water company, was elected mayor, and one Harrison, one of the incorporators of the water company, and F. X. Schottmiller, a stockholder, were elected supervisors of the town. The common council consisted of the mayor, five supervisors, and five aldermen; and Supervisor Schottmiller owned two shares of the stock of the water company at the time the city ordinance of August 2, 1887, was passed, and was present when it was passed, and without his presence there would not have been a quorum. From time to time since its passage, up to and including the passage of the ordinance of August 22, 1893, the common council of the city of *Ashland* passed divers ordinances requiring the water

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company to extend its mains and place hydrants under the provisions of such original ordinance, and refer to it in said ordinances as an existing ordinance. By subch. 11, ch. 27, Laws of 1889, it was provided that, whenever the waterworks should be owned by the city, the same should be operated under the direction of the board of public works, and that the "common council shall have power to legislate on all matters with reference to the construction, operation, management and protection of waterworks for the city, not contravening the provisions of this act, or the constitution or laws of this state, *or contracts already made*," etc. Evidence was given showing the equalized assessment of the town of Ashland for 1883 was $1,028,836; for 1884, $1,928,327; for 1885, $1,333,438; for 1886, $1,200,000; for 1887, $1,000,000; and that its assessment as returned in 1886 was $2,037,541.

The court refused to direct a verdict in favor of the defendant, and held that the ordinance mentioned in the complaint, on which the prosecution was based, was valid; and that the ordinance or contract made or alleged to have been made between the city of *Ashland* and the water company was invalid; and that the recent ordinance was the one that governed the case; and that the jury might convict the defendant of the offense charged if satisfied beyond a reasonable doubt of the defendant's guilt.

For the appellant there was a brief by *Tomkins & Merrill*, and oral argument by *W. M. Tomkins*. They argued, among other things, that the ordinance of August 2, 1887, is a contract between the city and the water company. It was entered into pursuant to subd. 11, sec. 3, subch. 5 ch. 127, Laws of 1887.[1] The authorized body of a mu-

[1] Sec. 11, subch. 5, ch. 127, Laws of 1887, provides that the common council of the city of *Ashland* shall have authority, by ordinance, resolution, or by-laws: "11. To make and establish public pounds, pumps, wells, cisterns, and reservoirs, and to provide for the erection of water

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nicipal corporation may bind it by an ordinance, which, in favor of private persons interested therein, may, if so intended, operate as a contract. 1 Dillon, Mun. Corp. (4th ed.), § 474; 1 Beach, Pub. Corp. 254; *Fleckner v. Bank of U. S.* 8 Wheat. 338; *Argus Co. v. Albany*, 55 N. Y. 495; *Duncombe v. Ft. Dodge*, 38 Iowa, 281; *Goldsboro v. Moffett*, 49 Fed. Rep. 213. Municipal corporations entering into private or commercial contracts deal as private corporations or individuals, and are subject to the same duties and liabilities. *Western Sav. F. Soc. v. Philadelphia*, 72 Am. Dec. 730; *Indianapolis v. Indianapolis G. L. Co.* 66 Ind. 408. The ordinance being a contract, and the water company having acquired vested rights under the same, the common council had no power or authority to revoke or alter the same without the consent of the water company. *State v. Jersey City*, 49 N. J. Law, 303; *New Orleans v. G. S. T. & T. Co.* 3 So. Rep. 533; *People v. O'Brien*, 111 N. Y. 1.

For the respondent there were briefs by *Geo. P. Rossman*, city attorney, and *J. J. Miles*, of counsel, and oral argument by *Mr. Miles*.

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works for the supply of water to the inhabitants and to the said city for fire protection and other purposes; to secure the erection of said waterworks, said city may, by contract or ordinance, grant to any persons, company, or corporation, the full right and privilege, and empower and authorize such company, persons, or corporation to build for themselves and own such waterworks, and to maintain, operate, and regulate the same, and in so doing to use the streets and alleys of said city in laying and maintaining the necessary pipe lines and hydrants, for such term of years and on such terms and conditions as may be prescribed by such ordinance or contracts, and may also, by contract or ordinance, provide for the supplying from said waterworks the said city with water for fire protection and other purposes, and also the inhabitants thereof with water, for such term of years, for such price, in such manner, and subject to such limitation as may be fixed by said contract or ordinance."—REP.

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PINNEY, J. 1. The franchise of the Ashland Water Company to supply the inhabitants of the unincorporated village of Ashland with water, upon the terms stipulated in the original ordinance and the several ordinances amendatory thereof, was evidently granted by the supervisors of the town of Ashland, acting apparently under the statutes (secs. 819*a*, 892, 1780, S. & B. Ann. Stats.) giving, as therein provided, to town boards of towns containing one or more unincorporated villages having each a population of not less than 1,000 inhabitants, certain powers, as applicable thereto, conferred upon village boards by the provisions of ch. 40, R. S., and acts amendatory thereof. No proof of previous authority from the electors of the town was shown, and it is doubtful whether the town ordinances were upon sufficient authority. *Dullanty v. Vaughn*, 77 Wis. 38. It appears that the contract made or franchise granted in the first instance, or assumed to be, was by the town board of the town of Ashland to Vaughn, Flagler, and Linnen; and from an ordinance in evidence, passed by the town board October 6, 1885, it appears that the Ashland Water Company was the assignee of the franchise and contracts made with them, and that said assignment was thereby ratified and confirmed, and that the water company was ordered to make certain extensions of its mains, without any unnecessary delay, and erect certain hydrants at various points in the village. Other like extensions and hydrants were ordered by an ordinance, October 6, 1886; and these ordinances provide for the payment of a rental for the hydrants by taxation.

After the city was incorporated in April, 1887 (ch. 127, Laws of 1887), the common council passed the ordinance under which the water company charge and exact the rates complained of, the more material portions of which are stated above. It was prefaced by the statement that, "it

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being expedient and necessary to provide for the supply of water to the city of *Ashland* and its inhabitants for fire protection and wholesome water for domestic purposes, and the town of Ashland having heretofore caused such supply to be furnished under the five following ordinances, which are made a part hereof," by express reference, to wit, the ordinances referred to are incorporated in the city ordinance *in haec verba*, and it concludes with five other sections, the material parts of which are contained in the foregoing statement. Whatever doubt may exist whether the provisions of this ordinance were within the authority of the general statutes cited, there can, we think, be no question but that they became valid as a part of the city ordinance of August 2, 1887, and were within the power and authority of the common council. The franchise and contracts described therein, upon its passage and publication, became valid and binding as between the city and the water company.

It is enough that the franchise and contract between these parties is evidenced by matter of record, or by any writing or writings amounting to a written contract. It is not necessary that the franchise and contract should be granted or created by ordinance. A written resolution and acceptance are sufficient. The statute (S. & B. Ann. Stats. sec. 1780) expressly provides that the corporation "may make and enter into any contract with such city or village to supply such city or village with water for fire and other purposes upon such terms and conditions as may be agreed upon; . . . and any such city or village may, by contract duly executed by the proper authorities, acquire the right to use the water, . . . upon such terms and conditions as may be agreed upon by such corporation and the authorities of such city or village." The franchise is a special privilege, not belonging as of common right to the people at large. It is an executed contract on the part of the

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state, the consideration for which is the benefit which the public will derive from its use and exercise. The common council is authorized by the statute to grant such franchises, and they are as much the franchises of the corporation as if granted by an express statute, for the common council exercises in granting them a delegated authority, and what it does within that power is done by the legislature through its agency. The acceptance of the conditions of the grant by the water company beyond doubt constituted a valid contract between it and the city. *State ex rel. Att'y Gen. v. Madison St. R. Co.* 72 Wis. 620; *Bank of Augusta v. Earle*, 13 Pet. 519; *People v. A. & V. R. Co.* 24 N. Y. 261.

2. There is no provision in the statute delegating to the common council of the city the power to alter or repeal a grant of such franchise, though, through the exercise by the legislature of the reserved power in sec. 1, art. XI, of the constitution, it might alter or repeal it at will. In the absence of an express delegation to the common council, we think none can be implied. It was therefore beyond the power of the common council to alter, repeal, or impair in the least the franchise or contract in question, and the ordinance upon which this prosecution is founded is therefore clearly void.

It was, however, insisted that such power had been conferred on the council by the amended charter of the city (Laws of 1889, ch. 27, subch. 11), which provides that "whenever the waterworks shall be owned by the city, the same shall be operated under the direction of the board of public works;" and that "the common council shall have power to legislate on all matters with reference to the construction, operation, management, and protection of waterworks for the city, not contravening the provisions of this act, or the constitution or laws of this state, or contracts already made," etc. This act evidently is applicable

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only in case the city builds waterworks of its own, or acquires the works of the water company, as it had reserved the right to do, and clearly indicates that its power of legislation could in no event be exercised to the prejudice of existing contracts, meaning, no doubt, the contracts here in question.

3. It was argued that as the vote of Schottmiller as a member of the common council, and who held two shares of stock of the water company, was required to pass the ordinance, it was therefore void, under the charter then in force (Laws 1887, ch. 127, subch. 14, sec. 3), which provides that "no member of the common council shall be a party to or interested in any job or contract with the city, and any contract with the city in which any such member may be so interested shall be null and void; and in case any money shall have been paid on any such contract, the city may sue for and recover the amount so paid from the parties to such contract, and from members of the common council interested in the same," — and, further, that the amount of annual water rentals which the city stipulated by the ordinance to pay to the water company in semi-annual payments during the term for which the franchise was granted constituted a debt against the city *in præsenti*, and was in excess of five per cent. of the taxable property of the city at the then last valuation thereof; and that therefore the ordinance and contract contained in it were prohibited by sec. 3, art. XI, of the constitution. It is a general rule that the validity of the grant of a franchise cannot be questioned collaterally or in any other way than upon proceedings by *quo warranto* for alleged usurpation of such franchise at the suit of the state. Ang. & A. Corp. §§ 731, 739, 742, 747; Booth, St. Ry. Law, § 44; *In re New York El. R. Co.* 3 Abb. N. C. 401. It would be intolerable if, upon any litigation between the city and the water company in relation to their respective rights or du-

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ties under the ordinance in furnishing water, the water company could be put to strict proof of the existence of its franchise, and so, too, in respect to the rights and franchise of any corporation.

4. The objections of the city to the validity of the franchise and contract, if established, would necessarily prove fatal to the validity of the ordinance, and to the present prosecution under it; for it is manifest that if the franchise and contract contained in the ordinance of August 2, 1887, are, as the plaintiff contends, utterly null and void, the common council of the city of *Ashland* had no power whatever to pass the ordinance of August 22, 1893, and no power to legislate in respect to the rates which the water company, through the defendant, might charge for furnishing water, for in that respect the city and the water company would be as utter strangers to each other, neither owing any duty or obligation to the other.

For these reasons the circuit court erred in ruling that the ordinance last mentioned was valid, and that the defendant might be convicted under it.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded with directions to dismiss the complaint.

STELTZ, Appellant, vs. THE CITY OF WAUSAU, Respondent.

October 29 — November 13, 1894.

Municipal corporations: Tort action: Presentation of claim: Pleading.

Sec. 161, ch. 151, Laws of 1883, providing that "no action in tort shall lie or be maintained against the city of Wausau unless a statement" of the wrong and of the damages claimed shall be presented to the common council within ninety days after the occurring of the tort alleged, is applicable to an action for damages on account of a nuisance created by the city, and the presentation of such statement must be alleged in the complaint. *Hughes v. Fond du Lac*, 73 Wis. 380, distinguished.

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APPEAL from the Circuit Court for *Marathon* County.

This action was commenced September 20, 1892. The complaint alleges, in effect, the incorporation and organization of the defendant city; that the plaintiff by occupation is a public teamster, doing business therein; that he is now, and for more than seven years has been, the owner in fee and the occupant of the premises therein described; that he has erected thereon a dwelling house, stable, and other outhouses; that adjacent to said premises is Bull creek, which originally had its natural flow or outlet in the Wisconsin river, about 600 feet east from the plaintiff's said dwelling; that about seven or eight years ago the defendant, in opening up a public street or highway from Pine or First street to the bridge across said river, diverted said creek from its natural course, and turned the same into a channel or culvert then made by the defendant; that said channel or culvert is insufficient to carry off the water of said creek, and by reason thereof, at different times each and every year, said creek has flooded not only said premises but also the highways or public streets towards and along the same, making the same impassable for teams and pedestrians for several months each and every year; that the plaintiff has suffered damages by reason of such flooding in each of the years 1888–1892, inclusive, in the sum of $150; that the defendant had allowed and permitted said culvert or channel so constructed to become obstructed, causing water to overflow the plaintiff's premises and the highways leading thereto and past the same, to the plaintiff's great injury and damage; that in each of said years the plaintiff notified the defendant and its officers of the condition of the premises and the culvert or channel, and requested and demanded that they clear the same or otherwise remove the obstruction to the water of said creek, but that the defendant had neglected and refused to do so, to the plaintiff's great injury and damage; that July 11,

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1892, the plaintiff filed with the defendant's clerk, at his office in said city, a full and complete statement and account of his cause of action, and the amount of damages claimed herein, and the same was duly presented to the mayor and common council of said city, and by them, at a lawful meeting thereof, August 1, 1892, fully disallowed. Judgment for said damages is prayed.

To that complaint the defendant demurred on the grounds (1) that the complaint does not state facts sufficient to constitute a cause of action; (2) that the court has no jurisdiction of the person of the defendant or the subject matter of the action. From an order sustaining such demurrer the plaintiff appeals.

For the appellant the cause was submitted on the brief of *Carl H. Mueller*, attorney, and *C. F. Eldred*, of counsel. They contended, *inter alia*, that sec. 161 of the charter does not apply to actions in tort arising out of the city's misfeasance or positive wrong, or out of the city's nonfeasance or negligence, but only to actions arising out of torts of others for which the city is liable, or out of torts for which the city is liable by statute, not at common law. *Hughes v. Fond du Lac*, 73 Wis. 380; *Houston v. Isaacks*, 68 Tex. 116; *Holmes v. Paris*, 75 Me. 560; *Ft. Wayne v. Coombs*, 107 Ind. 78; *Madison v. Baker*, 103 id. 41; *Chicago v. Johnson*, 53 Ill. 95; *Furnell v. St. Paul*, 20 Minn. 121; *Moore v. Minneapolis*, 19 id. 302; *Lafayette v. Blood*, 40 Ind. 65; Dillon, Mun. Corp. (4th ed.), § 1024; *Barton v. Syracuse*, 36 N. Y. 54; *Brooks v. Somerville*, 106 Mass. 271; *Monies v. Lynn*, 119 id. 273; *People ex rel. Att'y Gen. v. Utica Ins. Co.* 15 Johns. 358; *Jackson v. Collins*, 3 Cow. 89; *Alexander v. Mt. Sterling*, 71 Ill. 366; *Little v. Madison*, 42 Wis. 653; *Seifert v. Brooklyn*, 101 N. Y. 143.

For the respondent there was a brief signed by *Silverthorn, Hurley, Ryan & Jones*, of counsel, and *F. J. Tyrrell*, city attorney, and oral argument by *E. L. Bump*.

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CASSODAY, J. The complaint apparently states facts sufficient to show that the defendant created a nuisance of special and peculiar damage to the plaintiff. *Evans v. C., St. P., M. & O. R. Co.* 86 Wis. 603. It would seem that notice by the injured party to the author of such nuisance, as to the location and nature of the same and the damages sustained thereby, was not a condition precedent to the maintenance of an action therefor at common law nor under sec. 1339 or sec. 3180, R. S. *Hughes v. Fond du Lac*, 73 Wis. 380; *Cairncross v. Pewaukee*, 86 Wis. 186. In *Hughes v. Fond du Lac*, the charter provision was that "*no action shall be maintained* against the city" unless notice in writing be given "within five days of the occurrence of such injury or damage," etc. Sec. 5, ch. 299, Laws of 1885. This language is substantially the same as sec. 1339, R. S., except that the notice was to be given in five days instead of ninety days. It is contended that the same rule is applicable to the case at bar. But the charter provision here in question is that "*no action in tort shall lie or be maintained* against the city of Wausau unless a statement in writing, signed by the person injured or claiming to be injured, of the wrong and circumstances thereof and amount of damages claimed, shall be presented to the common council within ninety days after the occurring or happening of the tort alleged." Sec. 161, ch. 151, Laws of 1883. The complaint entirely fails to allege that any such notice was given, or any such claim presented, within the time prescribed. This is an action in tort, and comes within the express language of the section. As observed, that section declares that no such action "shall lie or be maintained" unless such notice be given and such claim presented within the time mentioned. In other words, the section makes the giving of such notice and the presentation of such claim a condition precedent, not only to the maintenance of such an action, but to the commencement

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of such an action. This is in accord with the repeated decisions of this court. Thus, in *Hiner v. Fond du Lac*, 71 Wis. 78, the provision of the charter then in force and applicable was substantially the same as the charter provision of the defendant here involved, and the complaint in that case, as the complaint in this, failed to allege the giving of such notice or the presentation of such claim within the time prescribed; and the judgment was reversed because the court refused to sustain the demurrer *ore tenus* to the complaint. *Sowle v. Tomah*, 81 Wis. 351. Those cases, and others like them, rule the case at bar.

By the Court.— The order of the circuit court is affirmed.

COHN and another, Appellants, vs. PLUMER, Respondent.

October 29 — November 13, 1894.

Contracts: Partial performance: Recovery quantum meruit: *Oral contract intended to be reduced to writing.*

1. One who contracted to furnish all the granite required for a building, according to the plans and specifications, for a specified sum, cannot recover upon *quantum meruit* if he fails to perform such contract.
2. Where a complete contract was made orally, the fact that it was expected that a written contract would afterwards be signed, embodying the terms of the oral contract, does not prevent the oral contract from taking effect.

APPEAL from the Circuit Court for *Marathon* County.

This was an action upon *quantum meruit* for the value of granite furnished by plaintiffs for the building of defendant's house. The defense was that the granite was furnished under an entire contract to furnish all the granite for the house, according to the plans and specifications, for

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$10,000, and that the plaintiffs failed to furnish a large portion of the granite.

The evidence showed that early in 1888 the defendant had plans and specifications prepared by Architect Holbrook, of Milwaukee, for the building of a house at Wausau, and that the plaintiffs, being the owners of a granite quarry, proposed to furnish the granite for the building; that in March, 1889, the plaintiff *Cohn* and defendant went to Holbrook's office at Milwaukee, and negotiated as to the furnishing of the granite. The defendant's evidence tended to show that an oral agreement was made at this meeting whereby the plaintiffs were to furnish all the granite above the grade line of the house for $10,000, and below grade line for $4 per car. The plaintiffs' claim was that no complete contract was made at Milwaukee, but that there was an arrangement which was to be reduced to writing by the architect, and was to become the contract when signed by the parties, which was never done. The evidence shows that a written contract was afterwards prepared by the architect, which was sent to *Plumer*, but objected to by *Cohn*, and was never signed. Immediately after the Milwaukee interview the plaintiffs commenced furnishing the granite, and when they had furnished something over one half of the necessary stone they abandoned the contract, after having been paid $5,245.50.

The jury found the following special verdict: "(1) Did the parties in this action enter into an agreement whereby the plaintiffs, per plans and specifications, agreed to furnish the defendant the granite for his house for the sum of $10,000, above grade line, and $4 per car below grade line? *A.* Yes. (2) Did the plaintiffs perform such labor and furnish such materials under said contract? *A.* Yes. (3) What extras did the plaintiffs provide or furnish, not called for by said contract? *A.* Molding. (4) What was the reasonable value of such extras. *A.* $23.75. (5) Did

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the defendant fulfill and perform said contract on his part? *A.* Yes. (6) Did the plaintiffs fail and neglect to perform said contract on their part? *A.* Yes. (7) What damages did defendant sustain by reason of the failure to perform said contract on their part? *A.* $448. (8) What has the defendant paid to the plaintiffs for such labor and materials? *A.* (By the court) $5,245.50. (9) What was the work and material done and furnished by the plaintiffs reasonably worth? *A.* $5,811.35."

After verdict, and before judgment, the defendant remitted all damages under his counterclaim, as found by the jury in answer to the seventh question. Upon this verdict, judgment was entered for the plaintiffs for $23.75 damages and costs, and plaintiffs appeal.

For the appellants there was a brief signed by *Brown & Pradt*, and oral argument by *Neal Brown*. They contended, *inter alia*, that the evidence shows that the parties came from the Milwaukee interview, each with a different understanding of the terms agreed upon, and that they did agree that the contract should be reduced to writing and executed. To make a contract, both parties must have agreed to the same thing in the same sense. Parsons, Cont. 475–477; *Hazard v. N. E. Mar. Ins. Co.* 1 Sumner, 218; *Bruce v. Pearson*, 3 Johns. 534; *Greene v. Bateman*, 2 Woodb. & M. 359; *Hartford & N. H. R. Co. v. Jackson*, 24 Conn. 514, 63 Am. Dec. 177; *Hodges v. Sublett*, 91 Ala. 588; *Bristol, C. & S. A. B. Co. v. Maggs*, 44 Ch. Div. 616; *Meynell v. Surtees*, 31 Eng. L. & Eq. 475; *Vassar v. Camp*, 11 N. Y. 441; *Johnston v. Fessler*, 7 Watts, 48; *Jordan v. Norton*, 4 Mees. & W. 155; *Ambler v. Whipple*, 20 Wall. 546; *Nat. Bank v. Hall*, 101 U. S. 43; *Baldwin v. Mildeberger*, 2 Hall, 176; *Coles v. Bowne*, 10 Paige, 526; *Utley v. Donaldson*, 94 U. S. 29; *Appleby v. Johnson*, L. R. 9 C. P. 158; *Calverley v. Williams*, 1 Ves. Jr. 210; *Saltus v. Pruyn*, 18 How. Pr. 512; *Crane v. Partland*, 9 Mich. 493; *Phillips*

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v. Bistolli, 2 Barn. & C. 511; Bishop, Cont. §§ 313, 323; *Dickinson v. Dodds*, 2 Ch. Div. 463; *Cooke v. Oxley*, 3 Term, 653; *Allis v. Read*, 45 N. Y. 142; *Winn v. Bull*, 7 Ch. Div. 29; *Rommel v. Wingate*, 103 Mass. 327; *Schenectady Stove Co. v. Holbrook*, 101 N. Y. 45; *Clark v. Burr*, 85 Wis. 649; *Rounsavell v. Pease*, 45 id. 506; *Strohn v. Detroit R. Co.* 21 id. 554; *Connery v. Best, Saxby & Co.* 1 Cab. & E. 291; *Braeutigam v. Edwards*, 38 N. J. Eq. 542. *Cohn*, when informed by seeing the Holbrook contract of *Plumer's* version of the agreement, repudiated it at once and told *Plumer* it did not show the agreement as made. *Plumer* made no sign, but allowed *Cohn* to go ahead in the faith that he would be paid what his work was worth. Having been silent when he should have spoken, *Plumer* should not now be heard to say that the talk in Milwaukee amounted to a special contract.

For the respondent there was a brief by *Mylrea, Marchetti & Bird*, and a separate brief by *Gabe Bouck*, and oral argument by *Claire Bird* and *Mr. Bouck*. They argued, among other things, that if the contract was made it was not invalidated by not having been reduced to writing. In the cases relied on by the plaintiffs, it will be found that it was a part of the parol contract, either expressed or implied, that it should not be deemed a concluded agreement until executed in writing. *Hodges v. Sublett*, 91 Ala. 588; 3 Am. & Eng. Ency. of Law, 854, note; *Pratt v. H. R. R. Co.* 21 N. Y. 305; *Blaney v. Hoke*, 14 Ohio St. 292; *Blight v. Ashley*, 1 Pet. C. C. 15; *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266; *Cheney v. East. Trans. Co.* 59 Md. 557; *Allen v. Chouteau*, 102 Mo. 309; *Lawrence v. M., L. S. & W. R. Co.* 84 Wis. 433, 435; *Lewis v. Brass*, 3 Q. B. Div. 667; *Rossiter v. Miller*, 3 App. Cas. 1124; *Bonnewell v. Jenkins*, 8 Ch. Div. 70; *Gibbon v. N. E. Met. Asy. Dist.* 11 Beav. 1. There can be no recovery *quantum meruit* for part performance of an entire contract. *McDonald v. Bryant*, 73 Wis.

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20; *Diefenback v. Stark*, 56 id. 462; *Koplitz v. Powell*, id. 671; *Davis v. Hubbard*, 41 id. 408; *Jennings v. Lyons*, 39 id. 553.

WINSLOW, J. If there was a complete contract made by the plaintiffs at the time of the meeting in the architect's office, to furnish all the granite required for the building, according to the plans and specifications, for a specified sum, then the plaintiffs cannot recover upon *quantum meruit*, because it is admitted that they failed to perform such contract. There was ample evidence to sustain the finding of the jury that such a contract was made. In fact, the testimony of *Cohn* himself tends very strongly to substantiate the claim, and the fact that the plaintiffs went to work getting out the stone and shipping it, immediately after the interview, is very significant. The fact that it was expected that a written contract would afterwards be signed, embodying the terms of the oral contract, does not prevent the oral contract from taking effect. *Lawrence v. M., L. S. & W. R. Co.* 84 Wis. 433. The jury, upon sufficient evidence and under correct instructions, have found that the contract claimed by defendant was made.

We see no defect in the special verdict. It fairly covers all the issues in the case. No other questions were requested by the plaintiffs, nor do we see any good ground for criticism of the first question. It fairly submits the pivotal question in the case to the jury. There seems to have been evidence to justify the jury in finding, in answer to the fourth question, that the reasonable value of the extras furnished was but $23.75.

The case was fairly tried and submitted, and we have found no error.

By the Court.—Judgment affirmed.

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BROWN, Respondent, vs. COHN and another, Appellants.

October 30 — November 13, 1894.

Ejectment: Counterclaim: Facts constituting legal defense: Tax titles: Forged redemption receipts: Practice: Setting aside stipulation waiving jury trial.

1. In ejectment, facts which constitute a complete legal defense are not the proper subject of a counterclaim. Thus, defendants claiming under tax deeds cannot allege as a counterclaim that redemption receipts upon which plaintiff relies to defeat such deeds are forged and fraudulent, and have such receipts set aside or canceled as a cloud upon the title. The ejectment action would be followed by a judgment conclusive as to the title, and if plaintiff should discontinue defendants might at once bring an action to protect their title; or, if there is danger of the loss of testimony of material witnesses, they may proceed to perpetuate such testimony under the statute.
2. Redemption receipts not countersigned by the county treasurer as required by sec. 1167, R. S., are not evidence of redemption and, being void upon their face, do not constitute a cloud upon title which equity will interfere to remove, even though they might be used to corroborate evidence of actual payment of the proper sums for redemption.
3. A stipulation waiving a trial by jury was entered into upon the supposition that the case would turn substantially or wholly upon questions of law. Afterwards it transpired that questions of fraud and forgery would be tried, in respect to which charges of perjury were suggested. *Held*, that it was not an abuse of discretion to relieve the plaintiff from the effect of the stipulation, the defendants not being placed thereby in any worse position than before the stipulation was made.
4. The fact that defendants may not be able to get a fair trial in the county where the action is pending, on account of the influence and standing of the plaintiff and his relatives and friends, is not a reason for refusing to set aside such a stipulation and denying to plaintiff the benefit of a jury trial. The provisions for change of venue must be held a proper protection to defendants.

APPEALS from the Circuit Court for *Oneida* County.

This is an action of ejectment in which the plaintiff had judgment for the recovery of the premises claimed, upon a

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trial before the court without a jury, a jury trial having been waived by stipulation of the parties. This judgment was reversed on appeal (*Brown v. Cohn*, 85 Wis. 1, where the case is sufficiently stated), this court having held that the tax deeds under which the defendants claimed the premises were properly executed and valid tax deeds.

After the cause had been remanded for a new trial, the defendants made a motion, founded upon sundry affidavits and papers on file, for leave to serve and file an amended answer, setting up by way of counterclaim that the plaintiff makes a claim of title to the premises in question, adverse to the defendants, on the ground that he has paid and redeemed the lands from the tax sales of 1875 and 1876, upon which the said tax deeds were issued, and that by reason of such payment said deeds are void, and that he claims and pretends to hold tax or redemption receipts, in writing, signed by the county clerk of Lincoln county, showing the payment and redemption of said lands from such sales prior to the issuing of such deeds, and bases his claim to the title to said lands thereon; that such claim is false and fraudulent, in that in truth said taxes were never paid or redeemed, and that said pretended tax or redemption receipts, which purport to show the payment of such taxes, are false, forged, and fraudulent, and were never in fact executed or delivered by the county clerk of the county, or by any officer or agent thereof; that they purport to be signed by the county clerk of Lincoln county at the date thereof, and are in the ordinary and usual form of tax receipts issued by county clerks; that there was no record or any entry ever made of such pretended redemption by the county clerk in his office, or in any of the public offices of the county, or by any of the officers thereof, and that such receipts are not matters of record anywhere. It appeared that they had not been countersigned by the county treasurer, and that they were relied on by the

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plaintiff as proof of the invalidity of the title of the defendants; and it was claimed that they ought to be delivered up and canceled, and plaintiff perpetually enjoined and restrained from claiming or asserting any title to said lands, or any right therein, under the same; that plaintiff had used them to harass and annoy the defendants, and had introduced them in evidence on the former trial to show redemption of the lands in question; and that after the trial was closed, and their false and fraudulent character discovered, and a motion made for a new trial on account thereof, the plaintiff withdrew said receipts from the evidence, but that he intends in the future, and at the next trial of this action, to assert title through and by means of such receipts. It is alleged that witnesses who can testify as to their false and fraudulent character may die or leave the jurisdiction of the court, so that defendants' ability to show their true character may be greatly impaired unless the relief prayed for in the counterclaim is granted. It is further alleged that, as to a certain tax deed of a portion of said premises to one C. J. Winton, the plaintiff claims such deed to be null and void, because of the action commenced by him to annul the tax sales and restrain the issuing of a tax deed thereon; that said Winton was not a party to said action, and did not know of the pendency thereof, or of the injunctional order therein, at any time; that he obtained title to the certificates prior to the commencement of the action, and applied for and obtained said tax deeds without any knowledge of the proceedings in said action, and that no *lis pendens* or notice of the object and pendency of said action had been filed. The defendants demanded judgment establishing their claim of title to said lands against any claim of the plaintiff thereto, and that he be forever barred from claiming or asserting any right or title thereto adverse to the defendants, and that he surrender and release his title to them, and deliver up to the

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court the pretended tax or redemption receipts, that the same may be canceled, and for general relief.

The court made an order denying the application to so amend the answer, from which the defendants appealed.

At the same term the plaintiff moved the court that he be relieved from the stipulation waiving a trial by jury therein, and that the issues therein be tried by a jury, founded upon the affidavit of one of the plaintiff's attorneys, to the effect that the only questions to be litigated and in contemplation of plaintiff and defendants when said stipulation was made were three certain questions of law, namely: (1) Whether said tax deeds by virtue of which the defendant *Cohn* claimed title were void on their face; (2) whether two of said deeds were not rendered void by the payment of the money to the county clerk, as evidenced by the redemption receipts issued by him, but not countersigned by the county treasurer; (3) whether the third tax deed was not void by reason of its having been issued in violation of the injunctional order of the court,—and that said stipulation was made solely on the belief of the plaintiff that these were the only issues to be presented for determination; that, after the trial of the cause, divers affidavits had been filed on behalf of the defendant to open the case for further trial, charging that said receipts were forgeries, and the money to redeem the said lands had never been paid; that the plaintiff thereupon obtained leave to withdraw all evidence in relation to the payment of said money and said receipts, and then rested his case solely upon the validity of the tax deeds as they appeared upon their face; that the trial of the issue in respect to these matters would require the testimony of divers and numerous witnesses as to the genuineness of the signatures to said receipts, and as to whether they had been altered or changed by the plaintiff or his agents since issued, if ever issued; and that plaintiff desires such issues to be tried

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by a jury, and that the stipulation waiving trial by jury be vacated.

The affidavits of the defendant *Cohn* and two of his attorneys were read in opposition, stating, in substance, that the action is peculiarly the subject of equity jurisdiction and cognizance, and the questions of law and fact in it so intimately blended, with reference to the Winton tax deed, that neither party could have adequate and full relief by a jury trial; that the issue made upon the two pretended redemption receipts could not be fully and fairly tried by a jury, and that the defendants would claim, and offer evidence to show, that such receipts are forgeries, and the plaintiff never did pay or redeem from said taxes; and in support of this contention it is stated that they will require at the trial the sales books from the office of the county clerk and county treasurer of Lincoln county for every year from 1875 to 1883, and the stub receipt books from the office of said county clerk, and that a vast amount of record evidence of this kind will be offered to show that the disputed receipts are forgeries; that these proofs and the forged receipts will have to be separately and carefully examined, some of them with a microscope, and that such examination will necessarily extend to many thousand items of written evidence, and take several days' time; that it would be impracticable and impossible for a jury to go through these matters of testimony and make the proper comparisons and examinations; that the real reason for plaintiff's application to vacate the stipulation is not that a jury is the most fit and appropriate tribunal before which to try the case, but because the action is pending in Oneida county, having little or no population outside of Rhinelander, the county seat, and the small stations along the railroad that passes through it; that, of the 4,000 inhabitants, about 3,500 reside in Rhinelander. The affidavits detail that the plaintiff has conducted and carried on a num-

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ber of business enterprises in Rhinelander for the last six years, and show that he has three sons and a son-in-law largely engaged in various business enterprises in said village and county; that they have a large circle of friends and business acquaintances, and are men of influence and wealth, and control the social, business, and political life and affairs of said village and county; that they own and operate a bank there, and own nearly all the stock of the Pelican Boom Company, organized for the purpose of rafting, booming, and driving logs on the river, and it handles annually about 80,000,000 feet of logs and timber; that the sawmills in the village, owned by various parties, are dependent on the boom company for handling and sorting their logs each year; that said *Brown* and his sons own a large sawmill in the village, and have a part or the entire ownership of the waterworks and electric light plants, and are engaged in other business enterprises; and that for these and other similar reasons it would be impossible for the defendants to secure a fair trial before a jury in that county, and to vacate the stipulation would render it impossible for them to secure a just and impartial trial.

The court made an order vacating the stipulation waiving trial by jury, from which the defendants appealed.

For the appellants there were briefs signed by *Brown & Pradt* and *H. C. Hetzel*, and oral argument by *Neal Brown*.

For the respondent there were briefs by *Raymond, Lamoreux & Park*, and oral argument by *B. B. Park* and *John Barnes*.

PINNEY, J. 1. This action is strictly a legal one for the trial of the question of title to the lands in dispute. The defendants seek to set up by way of counterclaim, in substance, that the certificates of redemption on which the plaintiff relies to defeat two of the tax deeds under which the defendants claim title to the premises are false, forged,

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and fraudulent, and that they constitute a cloud and claim upon and against the defendants' title to the lands in question; and they ask judgment that the receipts be delivered up and canceled, and their title to the lands be quieted and established as against the claims of the plaintiff. There can be no doubt whatever that the defendants, under their original answer, could avail themselves of, and give in evidence, all the matters set up in their so-called counterclaim. Their defense at law in these respects is perfect. But they insist that they have a right to plead these facts by way of counterclaim, and obtain the affirmative relief prayed for, inasmuch as the plaintiff may, as of course, dismiss his legal action, and prevent a judgment that would be conclusive upon the title to the lands, and thus leave their title or claim of title subject to the hostile claim and cloud cast upon it by the plaintiff's claim and his alleged false and forged receipts or certificates of redemption.

It seems to be well established that a counterclaim based upon the same facts which constitute a complete legal defense cannot be maintained. *Page v. Kennan*, 38 Wis. 320, 324; *Lawe v. Hyde*, 39 Wis. 345, 354; *Pennoyer v. Allen*, 51 Wis. 360. A court of law, wherein the right of trial by jury is secured to the parties, is the appropriate tribunal and the proper forum for the trial and determination of questions of title to lands. *Page v. Kennan, supra.* Fraud is an original ground of jurisdiction in equity; but courts of law exercise a concurrent jurisdiction on this ground with courts of equity in very many cases, and it is a general rule, as between different tribunals having concurrent jurisdiction to administer and grant relief, that the one first acquiring jurisdiction will continue to retain it to the end. The defendant in an action of ejectment cannot, by setting up a legal title by way of counterclaim, or by attacking in that manner the title of the plaintiff on the ground of fraud, transfer the trial of the cause, so to speak, to the

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equity side of the court, and make the action one of equitable cognizance instead of a legal action triable by jury, if there is no other subject or peculiar ground of equitable cognizance. If the contention of the defendants is maintainable, nearly every action for the recovery of real estate could, by mere form of pleading, be made cognizable in equity, and the plaintiff be thereby deprived of a trial of his action by a jury.

The statute in relation to pleading defenses in actions of ejectment (sec. 3078, S. & B. Ann. Stats.) provides that "the defendant may demur to or answer the complaint, as in personal actions; he may also in his answer set up any matter as a defense which would have heretofore formed an *equitable* defense, in which case the answer shall contain a demand for such judgment as he claims." An *equitable* defense may be of a character entitling the defendant to affirmative relief, or it may have a negative operation merely, protecting him from the plaintiff's claim or demand; but in either case, under this statute, the equitable defense must be pleaded as a counterclaim, and a court will give to it proper effect, affirmative or negative, as the case may require. *Weld v. Johnson Mfg. Co.* 86 Wis. 551. In this case an equitable defense, not pleaded as a counterclaim, was held bad on demurrer, while the same matter in a case between the same parties, pleaded as a counterclaim, was held good on demurrer, and a negative or defensive effect accorded to it to defeat the plaintiff's action. *Weld v. Johnson Mfg. Co.* 86 Wis. 552. The matters set out in the proposed counterclaim constitute only defenses *at law* to the plaintiff's claims of title, and not *equitable* defenses, within the proper sense of the term, and are not, therefore, the proper subject of counterclaim in the action; nor is there any reason why they should be so esteemed. An action of ejectment, instead of being a mere possessory action, as at common law, allowing a defeated and ousted

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defendant to turn around and maintain a new action of ejectment against his opponent, is, by force of the statute (S. & B. Ann. Stats. sec. 3088), followed by a judgment "conclusive as to the title established therein, upon the party against whom it is rendered, and upon all claiming from, through, or under him by title accruing after the filing of a notice of the pendency of the action," etc., subject to certain exceptions not material to the present case. It binds the party against whom it is rendered, and those in privity with him. *Smith v. Pretty*, 22 Wis. 655; *Wolf River Lumber Co. v. Brown*, *post*, p. 638, and cases cited.

It is true, also, that, upon substantially the grounds set up in the proposed counterclaim, the defendants, if the plaintiff had not brought his action, might have brought their original action, if in possession, against the plaintiff, to cancel the receipts or certificates and compel him to release his claim of title, if in other respects they could bring themselves within the statute on this subject (R. S. sec. 3186); and if not in possession, and the plaintiff should dismiss his action, they could at once bring ejectment against him, or other appropriate action to protect their title, if they can establish it against his claim of title to the premises. R. S. sec. 3075. Besides, if any danger exists of the loss of testimony of material witnesses, the defendants could proceed to perpetuate their testimony, as provided by statute; and in any event, if the plaintiff dismissed his action, they would not be more unfavorably circumstanced than before it was commenced. It is evident that the fact that the plaintiff may at will discontinue his action furnishes no ground for holding that the pleading tendered is available as a counterclaim.

2. The so-called tax receipts or certificates of redemption are in the usual form of such certificates, but were not countersigned by the county treasurer of the proper county. By the statute (R. S. sec. 1167), by virtue of which alone

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they could become legal evidence of redemption, it is provided that such a receipt "before it shall be evidence of such redemption shall be presented to the treasurer of the same county, and be countersigned by him." The receipts could not be legal evidence of the redemption of the lands described in them, and, being void on their face, could not constitute a claim of redemption or cloud upon the title which a court of equity would interfere to cancel or set aside, for their invalidity would necessarily appear whenever they might be produced. *Meloy v. Dougherty*, 16 Wis. 269; *Ferson v. Drew*, 19 Wis. 225; *Cornish v. Frees*, 74 Wis. 495; *S. L. Sheldon Co. v. Mayers*, 81 Wis. 632; *Commercial Bank v. Fire Ins. Co.* 84 Wis. 18. Probably the receipts may be used on the trial to corroborate the plaintiff's evidence that he actually paid the proper sums to redeem the lands from the tax sales described in them, or to contradict the officer to whom it is said the money was paid, should he deny that he received it; but a resort to a court of equity to cancel or set them aside merely because they might be used for such a purpose would be not only unauthorized, but an unheard of proceeding. The questions in respect to the Winton tax deed are legal questions arising upon the record of the injunction suit to which he was not a party, and upon such proof of redemption from the sale upon which the deed was founded as the plaintiff may be able to produce. The circuit court rightly denied the motion for leave to interpose the proposed counterclaim.

3. Stipulations entered into in relation to the management and conduct of an action by an attorney are binding upon his client, and cannot be set aside or disregarded at his mere caprice or option. The court, however, may, upon proper cause shown, relieve a party from the effect of a stipulation, or set it aside; and what is proper cause is matter of discretion with the court, the exercise of which

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will not be interfered with on appeal, unless this discretion has been abused. It is plain that the stipulation waiving a trial of the action by a jury was made when it was supposed that the trial involved no difficult or disputed questions of fact and that the case would turn substantially or wholly upon questions of law. Subsequently it was ascertained that questions of fraud and forgery were involved and are to be tried, and in respect to which charges of perjury were suggested at the argument. While we would not have been inclined to reverse the order had the plaintiff's motion been denied, yet, in view of the facts and circumstances disclosed, we hold that the granting of the motion was within a fair exercise of judicial discretion.

The fact that the defendants may not be able to get a fair trial in the county where the action is pending, on account of the influence or standing of the plaintiff and his relatives and friends, furnishes no reason for denying the plaintiff the benefit of a trial of the action by a jury. The statutory provisions for change of place of trial must be held to be a proper protection, as well in this case as others, to the rights of a party against the effect of all such prejudicial influences. There is nothing to show that the defendants, by reason of the order setting aside the stipulation, will be placed in a worse position than before it was made. The circuit court did not err in vacating the stipulation and restoring the parties to their former position.

By the Court.—The orders of the circuit court appealed from are both affirmed.

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WOLF RIVER LUMBER COMPANY, Appellant, vs. BROWN, Respondent.

October 30 — November 13, 1894.

Injunction to restrain action at law: Replevin for logs: Adequate legal defense: Title to lands: Res adjudicata.

1. In replevin for logs the complaint alleged as the foundation of plaintiff's title thereto that he was the owner of the land from which they were cut, and the answer alleged that the title to both land and logs was in defendant. *Held*, that defendant, to defeat plaintiff's title, might show that tax redemption receipts upon which his claim to the land was partly based were forged and fraudulent, and that a tax deed under which he claimed was void. In respect to such matters, therefore, defendant has a plain and adequate remedy and defense at law, and they constitute no ground for restraining the prosecution of the replevin action.
2. A judgment in favor of the defendant in such replevin action on the question of the title to the logs would be conclusive as to the title to the lands so put in issue therein, whenever it should come in question between the parties or their privies; and defendant would need no affirmative relief as to such title.

APPEAL from the Circuit Court for *Oneida* County.

This is an action to obtain a perpetual injunction enjoining and restraining the defendant from prosecuting a certain action of replevin, brought in the circuit court for Oneida county by the defendant against the plaintiff, for the recovery of 450,000 feet of pine saw logs, the property of the plaintiff in that action, having certain specified marks, alleged in the complaint therein to have been cut during the winter of 1891–92 from the S. W. ¼ of the S. W. ¼ of section 17, township 39 N., of range 8 E., in Oneida county, Wis., which the plaintiff therein owned in fee simple, and were removed therefrom by the *Wolf River Lumber Company*, the defendant in said action; and it was alleged that it wrongfully took said property from the plaintiff's possession, and had ever since unlawfully and wrongfully de-

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tained it, to the plaintiff's damage of $3,500. The answer of the *Wolf River Lumber Company* in the replevin action consisted of a general denial of the complaint, except as it specifically admitted, and alleged that the logs were cut and removed from the lands in question by one Kathan, who was in possession under paper title, claiming to be the owner thereof. This title was, in substance, a certain tax deed of the premises, dated May 16, 1878, to one J. D. Gillett, and another like deed dated September 11, 1879, both of which, it was alleged, were fair on their face and duly recorded; also a certain other tax deed to one John Mercer, dated 27th of June, 1885, in like manner fair on its face and recorded. The answer in the replevin action alleges that said Gillett and Mercer, through mesne conveyances, had conveyed to said Kathan the title so acquired by them prior to cutting said timber, and that he entered thereunder, and cut said timber and logs in good faith, believing said title to be valid; that more than three years had elapsed since the recording of each of said deeds before the commencement of the action, and no proceeding had been brought to set them, or either of them, aside, or to recover the possession of the lands from Kathan; and relied upon the statute of limitations of three years. The material facts in regard to two of the tax titles to the lands in question are substantially the same as in the case of *Brown v. Cohn*, *ante*, p. 627.

The complaint in this action, after setting out the plaintiff's title as founded upon said tax deeds, alleges that the title of Gillett and Mercer thereunder had been transferred to the plaintiff, and is held and owned by the plaintiff, and that the lands remained vacant and unoccupied for more than three years after each of said deeds was recorded, and that they were in the constructive possession of the tax-deed grantees, and insists upon the statute of limitations of three years as protecting and making perfect said

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title; that the defendant sets up a claim to said lands, and to be the owner thereof in fee, and to have title adverse to the plaintiff, but that such claim is illegal, fraudulent, and void and a cloud upon the plaintiff's title to said lands, to its great injury, etc.; that the defendant was the owner of the original or patent title to the lands, and claims that he paid the taxes of 1874 and 1875, for which the lands were sold in the years 1875 and 1876, and that he redeemed said lands from the tax sales thereof made in the year 1875 and in May, 1876, for such unpaid taxes, prior to the issuing of the tax deeds based thereon, and whereby the certificates of sale became void and of no force or effect, and said tax deeds are for that reason null and void; that the defendant pretends to hold such tax or redemption receipts of the county clerk, showing such payment of said taxes and the redemption of said lands prior to the time of issuing said tax deeds, but that the claim of the defendant that the lands were redeemed by him from such sales, and that the taxes for which said lands were sold were paid, is false and fraudulent, and that in fact said taxes for which the said lands were sold and conveyed had never been paid, or in any manner satisfied, except by the sale of said lands; that the pretended receipts of such payment of taxes and redemption are fraudulent, and were in fact never executed or delivered by the county clerk of said county, or by any officer or agent thereof; that they are not matter of record in the proper county offices where it is claimed the same were issued, and are being used by defendant as proof of his pretended claim to said lands, and of the invalidity of plaintiff's title thereto under said deeds. The complaint set out that the defendant claimed that there existed divers legal grounds of objection to the validity of the tax deed to Mercer, stating them at length, and that by reason thereof said tax deed was void, and a cloud on the defendant's title to the lands, and should be ordered to be delivered up and

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canceled; that the defendant sets up a claim to said lands under and by virtue of a tax deed issued to him, based on the sale thereof in the year 1888 by the county treasurer of Oneida county, where then situated, for the unpaid taxes of 1887, which deed was issued the 12th of November, 1891, and was recorded in the office of the register of deeds of Oneida county, November 13th of the same year, and claimed that it was void by reason of divers alleged illegalities, and constituted a cloud upon the title of the plaintiff to said lands, and ought to be set aside; and its willingness to pay the defendant, or into court for his benefit, the amount for which the lands were sold in 1888, and the amount that may have been paid by him for taxes on said premises subsequent to said sale, with twenty-five per cent. interest.

The complaint then alleges the entry upon the lands in question by plaintiff and one Kathan in the logging season of 1891–92, under a contract with the plaintiff, and claiming title under and by virtue of the tax deeds mentioned and certain mesne conveyances from the grantees therein named, and that they cut and removed from said lands a certain quantity of pine timber, in good faith, believing that it had an absolute title in fee simple and the right to cut the same; that thereafter, in June, 1892, the defendant commenced the said action of replevin for the recovery of the possession of said logs so cut thereon by the plaintiff and said Kathan, in which the defendant had answered the complaint; that it was still pending, and the said defendant, *Brown*, intended to prosecute the same, and based his claim of title to said lands, and his right to maintain said action against the said plaintiff for the cutting and removal of said timber, upon his said original title and the said forged, false, and fraudulent tax receipts, which he pretends and claims evidenced the payment and redemption of the taxes upon which the said two tax deeds

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to Gillett were issued, and that in that action the plaintiff herein has not pleaded, and could not aver as a basis for affirmative relief, the facts hereinbefore set forth respecting such pretended claim of title and such false and forged receipts, and that the plaintiff cannot in the replevin action obtain the relief prayed for herein, namely, a cancellation and surrender of such false and forged receipts, and a decree perpetually restraining said defendant from claiming title to said lands; that the prosecution of said action of replevin will injure the plaintiff, and put him to expense and annoyance, and that in said action he will be without remedy in respect to the claim of title of said defendant.

The defendant answered the complaint, insisting that he was the owner of the original title to said lands, and had paid the taxes for which the lands were sold in the years 1875 and 1876, and had redeemed the same from said taxes, and denying the allegations that such claims are false and fraudulent, or that said redemption receipts were void, but admits he is using them to defeat the plaintiff's false and fraudulent title, and to sustain his own, and insists that the tax deed to John Mercer is void; and he admits that he claims title by virtue of the tax deed issued to him, as stated in the complaint, on a certificate of sale of said lands, made in the year 1888, for the unpaid taxes of 1887, but denies the allegations in the complaint in respect to the validity thereof, and alleges a redemption of said lands by him from the sale thereof upon which the tax deed to said Mercer was founded, and insists that the plaintiff has a complete and adequate remedy at law as to the subject matter of this action and the cause of action alleged in the complaint; that the court in which the action of replevin is pending has jurisdiction of the parties and of the subject matter, and all issues in this action can be fully adjudicated and settled in the replevin action.

Upon the pleadings in this action, the pleadings in said

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action of replevin having been made exhibits to said answer, the plaintiff moved for a temporary injunction restraining the further prosecution of the replevin action until the further order of the court. The court made an order denying such injunction, from which the plaintiff appealed.

For the appellant there was a brief signed by *Hetzel & Smart*, attorneys, and *Brown & Pradt*, of counsel, and oral argument by *Neal Brown*. They contended, *inter alia*, that a judgment in the replevin action would not be a bar to an action of ejectment involving the title to the land. *Keyser v. Sutherland*, 59 Mich. 455; *Morse v. Marshall*, 97 Mass. 519; *Hargus v. Goodman*, 12 Ind. 629; *Sabins v. McGhee*, 36 Pa. St. 453; *Parker v. Hotchkiss*, 25 Conn. 321; *Chandler v. Walker*, 21 N. H. 286; *Arnold v. Arnold*, 17 Pick. 4; *Stokes v. Fraley*, 5 Jones, Law (N. C.), 377; *White v. Chase*, 128 Mass. 158; *Sawyer v. Woodbury*, 7 Gray, 499; *Johnson v. Morse*, 11 Allen, 540; Newell, Ejectment, 662, § 26. Such a judgment would be *res adjudicata* simply as as to the question of title to the logs described in the complaint, without in any way determining the title to the land, unless it is assumed that with reference to the title to the land the position of the parties remained the same. In the action of replevin neither party could file a *lis pendens* so as to place subsequent purchasers of the real estate involved upon notice. A defense may be complete in the sense that it defeats entirely the particular action as to which it is interposed, and yet in no sense amount to a remedy to the defendant so as to afford him such relief as to forever dispose of the subject of the controversy. *Boyce's Ex'rs v. Grundy*, 3 Pet. 210; *Barber v. Barber*, 21 How. 582. If any affirmative equitable relief is necessary to a full settlement of the controversy, and to a complete protection of the defendant's rights, a court of equity will interfere, entertain a suit for such relief, and enjoin the action at law. 3 Pom. Eq. Jur. § 1363; 1 Story, Eq. Jur.

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§ 33; *Watson v. Sutherland*, 5 Wall. 74; Kerr, Inj. in Eq. 582, 589; *Smythe v. Henry*, 41 Fed. Rep. 705; *Gould v. Sullivan*, 84 Wis. 659; *Wilson v. Hooser*, 76 id. 387; *Grignon v. Black*, id. 674. The rule that an injunction will not lie to restrain the prosecution of an action at law to which there is a perfect defense at law has no application in this case because plaintiff's equity is well planted, aside from the relief which it seeks by restraining the replevin action. *Metler v. Metler*, 18 N. J. Eq. 270, and cases there cited; *Cooper v. Joel*, 27 Beav. 313; *Glastenbury v. McDonald*, 44 Vt. 450, 453; *Atlantic De Laine Co. v. Tredick, Stokes & Co.* 5 R. I. 171; *Fernihaugh v. Leader*, 15 L. J. Ch. 458; *Allen v. Davis*, 20 id. 44; *Traill v. Baring*, 33 id. 521; *Bissell v. Beckwith*, 33 Conn. 257; *Bushnell v. Harford*, 4 Johns. Ch. 301; *Hamilton v. Cummings*, 1 id. 517; *Dale v. Roosevelt*, 5 id. 174; *Morris v. Barnwell*, 60 Ga. 147; *Athenæum L. Ass. Soc. v. Pooley*, 3 De G. & J. 294; *Sharon v. Hill*, 26 Fed. Rep. 337; 3 Pom. Eq. Jur. § 1363, note 3; Kerr, Inj. in Eq. 531, 532; 1 High, Inj. (3d ed.), § 66; *Wilson v. Hooser*, 76 Wis. 387.

For the respondent there was a brief by *Alban & Barnes*, and oral argument by *B. B. Park* and *John Barnes*. They argued, among other things, that a court of equity will not restrain an action at law, except when the party seeking to restrain has an equitable defense which he could not interpose in the legal action. *Rogers v. Cross*, 3 Pin. 36; *Pennoyer v. Allen*, 51 Wis. 360; *Marsh v. Edgerton*, 2 Pin. 230; 3 Pom. Eq. Jur. § 1361; *New York v. Brady*, 115 N. Y. 615; *Martin v. Orr*, 96 Ind. 27; *Shaw v. Chambers*, 48 Mich. 355; *Padgett v. Lawrence*, 10 Paige, 170; *Brown v. Haff*, 5 id. 235; 1 High, Inj. §§ 89–91. Actions at law will not be enjoined where the law court can do as full justice to the subject in dispute as a court of equity. 10 Am. & Eng. Ency. of Law, 881; 3 Pom. Eq. Jur. § 1361; *Lansing v. Eddy*, 1 Johns. Ch. 49; *Foster v. Wood*,

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6 id. 87; *Palmer v. Hayes*, 93 Ind. 189. The action at law will be restrained only when it involves only a portion of the controversy, or is likely to leave an apparent record title clouding the legal title in issue. *Shaw v. Chambers*, 48Mich. 355. A judgment is conclusive on every question of fact within the issues made, that is litigated on the trial. 2 Black, Judgm. § 609; *Warner v. Trow*, 36 Wis. 195; *Lawrence v. Milwaukee*, 45 id. 306.

PINNEY, J. 1. The question on this appeal is not whether the plaintiff may possibly be entitled to some equitable relief against the defendant upon some one or more of the various matters embraced in the complaint, in respect to which we are not now called upon to give any opinion, but whether the complaint shows any ground for restraining the prosecution of the defendant's action of replevin. The action of replevin is brought upon the ground that the plaintiff therein was the owner of the lands from which the logs, the subject of that action, were cut and removed by the defendant, who is the plaintiff in the present action, and that as such owner of the lands he owns also the logs in question and is entitled to recover them in his action of replevin. His ownership of the lands is expressly alleged in his complaint as the foundation of his title to the logs, and this was put in issue by the defendant's answer, and it claimed to be the owner of the lands and of the logs in question as well. In its complaint in this action, the defendant in the replevin suit makes the same claim of title to the lands and logs, and has set up various grounds upon which it attacks the title of the defendant herein, and insists that it is void. There can be no doubt that the defendant in the replevin suit, under the issue therein, is entitled to show any matter in evidence that will defeat the title of the plaintiff in that action, whether it relates to the validity of the alleged redemption of the lands on which the logs were cut from the tax sales, or to show in that action that the receipts or

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certificates of redemption are forged or fraudulent, or that the more recently acquired tax deed of the defendant in this action is void for any of the reasons set out in the complaint herein. It is plain from its complaint in the present action that, as defendant in the action of replevin, it has a plain and adequate remedy and defense at law, and it is elementary that in such case the plaintiff in the replevin action will not be restrained from prosecuting his action at law. *Pennoyer v. Allen*, 51 Wis. 360, 362; *Comm. Bank v. Fire Ins. Co.* 84 Wis. 12, 18, and cases cited.

2. If the plaintiff in this action can successfully defend itself in the legal action without resort to a court of equity, as we hold it may, in respect to the various matters it sets up to show the invalidity of the defendant's title, and is able to make good its claims in that respect, any judgment rendered in the action of replevin on the question of title to the logs, which has been expressly put in issue therein, will necessarily be conclusive on the title to the lands so put in issue, whenever it comes in question between the parties to this action, or their privies, in any other, although brought for a different purpose. For this reason, the plaintiff in this action will not need affirmative equitable relief in respect to its title. A judgment in favor of the defendant in the replevin action, upon the question of title to the logs, will be conclusive, not only as to the *res* of that case, but as to all further litigation between the same parties touching the same subject matter, though the *res* itself may be different. *Beloit v. Morgan*, 7 Wall. 619; *Gardner v. Buckbee*, 3 Cow. 120; *Taylor v. Matteson*, 86 Wis. 120; *Warner v. Trow*, 36 Wis. 196; *Lawrence v. Milwaukee*, 45 Wis. 306; *Morse v. Marshall*, 97 Mass. 522: *Doty v. Brown*, 4 N. Y. 71; *Babcock & Co. v. Camp*, 12 Ohio St. 12.

The circuit court rightly refused to grant the injunctional order applied for.

By the Court.— The order of the circuit court is affirmed.

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TUFTS, Appellant, vs. WEINFELD and another, Respondents.

October 30 — November 13, 1894.

Sale of chattels: Article to be manufactured: False representation: Unauthorized rescission: Measure of vendor's damages: Pleading.

1. As an inducement to the giving of an order for a soda-water fountain, the manufacturer's agent promised orally that he would not sell any fountain of that make to any one else on the same street, and the vendees relied on such promise, but the agent intended to break it and did break it. *Held*, that there was not such a fraud or false representation as would entitle the vendees to rescind or cancel the order. *Lee v. Simmons*, 65 Wis. 523, distinguished.
2. The order being for a soda-water fountain to be manufactured, and having been countermanded, the vendor had no right to go on and manufacture the fountain for the purpose of charging the full contract price or to increase the damages for the breach.
3. The damages recoverable in such case are the profits which the vendor would have realized had both parties performed the contract.
4. Although, after the order had been countermanded, the vendor completed the fountain and tendered it to the vendees and then brought his action for the whole contract price, yet, the profits which he would have realized having been proven without objection, he might recover them in said action, and the complaint will be deemed to have been amended accordingly.

NEWMAN, J., dissents, being of the opinion that the order in question was not one for a soda-water fountain to be manufactured, but for the specific articles which go to make up a fountain, and which are usually kept in stock and can be bought in the market, and that the measure of damages is the difference between the value of the goods at the time of the refusal to receive them and the price agreed upon.

APPEAL from the Circuit Court for *Marathon* County.

The plaintiff is a manufacturer and dealer in soda-water apparatus at Boston, Mass., and the defendants are in business at Wausau in this state. On May 16, 1892, the defendants wrote to the plaintiff, in effect, inquiring what discount and inducements he could offer them on said foun-

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tains. On May 26, 1892, the plaintiff's agent, Feldman, appeared at Wausau, and obtained a written order from the defendants to the effect that the plaintiff should forward a soda-water apparatus therein specifically described, and agreeing to pay therefor the sum of $500, to wit, to honor draft of $75 upon receipt of bill of lading of the same, and to pay the balance in sums of $20 per month until the whole should be paid. Afterwards, and on the same day, the defendants applied to said agent to release or return said written order, but he refused to do so. Thereupon, and on the same day, the defendants telegraphed to plaintiff, at Boston: "Cancel order given your agent. Letter by next mail." On May 27, 1892, the defendants wrote the plaintiff, referring to the telegram, that his agent had sold another fountain in Wausau, contrary to their verbal understanding, and that they had requested said agent, Feldman, to release the order, and that he had refused to do so, and that they must respectfully request the plaintiff to do so, and oblige.

In October, 1892, the plaintiff commenced this action for the breach of said contract. The complaint contains the usual allegations in such cases, and demands judgment for the $500, with interest from June 16, 1892, and costs. The defendants answered said complaint by way of admissions and denials, and alleged, in effect, that the contract had been procured by false representations. They also served on the plaintiff's attorney, with the answer, an offer in writing that the plaintiff might take judgment for the sum of $10 and costs.

At the close of the trial the jury returned a special verdict to the effect: (1) That the plaintiff's agent, Feldman, did represent to the defendants, before the contract for the soda-water fountain was signed by them, that he would not thereafter sell to any dealer on Third street, in the city of Wausau, any soda-water fountain of plaintiff's make;

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(2) that the defendants did rely upon such representations as a condition of making said contract; (3) that the plaintiff's agent, Feldman, did make such representations for the purpose of inducing defendants to enter into such contract; and (4) that at the time such representations were so made the plaintiff's agent, Feldman, did intend to sell a soda-water fountain to other dealers on Third street, if they would buy.

Both parties thereupon moved for judgment; and the court filed an opinion and decision in writing upon said motions, finding that the plaintiff is entitled to recover of the defendants the sum of six cents damages. And it appearing further that at the time of the service of the answer, and more than ten days prior to the opening of the term when said action was brought on for trial, the defendants duly served upon the plaintiff an offer of judgment for the sum of $10 and costs to that date, which said offer was not accepted, and that defendants' taxable costs subsequent to the date of such offer of judgment amounted to $35.41, it was ordered and adjudged that said defendants do have and recover of said plaintiff the sum of $35.35, the same being the amount of said costs, less the sum of six cents. From that judgment the plaintiff appeals.

For the appellant there were briefs by *Curtis & Reid*, and oral argument by *A. H. Reid.*

For the respondents there was a brief by *Mylrea, Marchetti & Bird*, and oral argument by *Claire Bird.* They contended, *inter alia*, that the false representation of the plaintiff's agent, though in the form of a promise, was a fraud. 1 Bigelow, Fraud, 484; Cooley, Torts, 486; *Lee v. Simmons*, 65 Wis. 523; *Burrill v. Stevens*, 73 Me. 395, 400; *Laing v. McKee*, 13 Mich. 124, 126; *Abbott v. Abbott*, 18 Neb. 503; *Dowd v. Tucker*, 41 Conn. 197; *Keith v. Herschberg O. Co.* 48 Ark. 138; *Darnaby v. Watts*, 21 S. W. Rep. 333. A vendor cannot arbitrarily insist on a full performance after a countermand, when to do so does not

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benefit him at all, but only increases the damages to the vendee. Bish. Cont. §§ 837, 841; 2 Suth. Dam. (1st ed.), 361, 362; *Dillon v. Anderson*, 43 N. Y. 231; *Clark v. Marsiglia*, 1 Denio, 318; *Danforth v. Walker*, 37 Vt. 239; *Derby v. Johnson*, 21 id. 17; *Nebraska City v. N. C. H. G. L. & C. Co.* 9 Neb. 339; *Moline Scale Co. v. Beed*, 52 Iowa, 307; Newmark, Sales, § 392; *Davis v. Bronson*, 2 N. Dak. 300; *Gibbons v. Bente*, 51 Minn. 499; *Tufts v. Lawrence & Co.* 77 Tex. 526; *Sonka v. Chatham & Co.* 2 Tex. Civ. App. 312; *Hosmer v. Wilson*, 7 Mich. 294; *Collins v. Delaporte*, 115 Mass. 162; *McClair v. Austin*, 17 Colo. 576; *Bradley v. Denton*, 3 Wis. 557; *Poposkey v. Munkwitz*, 68 id. 322; *Milwaukee Boiler Co. v. Duncan*, 87 id. 120. This was merely an executory contract at the time the countermand was received. 2 Suth. Dam. 353; 1 Benj. Sales (Corbin's Notes), § 308; *Tufts v. Lawrence & Co.* 77 Tex. 526; *Cockburn v. Ashland L. Co.* 54 Wis. 619; *Neal v. Shewalter*, 5 Ind. App. 147. Profits are the measure of damages for breach of contract of sale only when it appears that the commodity has no market price. 1 Suth. Dam. 109; *Cockburn v. Ashland L. Co.* 54 Wis. 619; *Dolph v. Troy L. M. Co.* 28 Fed. Rep. 553. Contract price less market value is the true measure of damages. Newmark, Sales, § 392; 1 Suth. Dam. 107; 2 id. 359; *Chapman v. Ingram*, 30 Wis. 290; *Sonka v. Chatham & Co.* 2 Tex. Civ. App. 312; *Tufts v. Lawrence & Co.* 77 Tex. 526; *Tufts v. Grewer*, 83 Me. 407; *Neal v. Shewalter*, 5 Ind. App. 147. The vendee is required to repurchase in the open market in order to reduce the damages he is to demand of the vendor. 1 Suth. Dam. 107; *Cockburn v. Ashland L. Co.* 54 Wis. 619; *Hammer v. Schœnfelder*, 47 id. 455. The same reason would require the vendor to resell in the open market for the same purpose.

Cassoday, J. Were it not for the written opinion of the trial court in the record, it might be difficult to ascertain just what questions were determined by that court. So

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much of that opinion as is necessary to a full understanding of the questions presented here for decision should have been printed in the case, as required by Rule VIII, as amended. As to such records as were filed with the clerk of this court prior to the publication of the new Rule VII½, it is, of course, impracticable to readjust and arrange chronologically the contents thereof, as prescribed by that rule; but there is no difficulty in paging the same as therein directed, nor even, in such cases, in arranging the same chronologically in the printed case, as prescribed by Rule VIII, as amended, and so there is no difficulty, even in such cases, to make the brief conform to Rule IX, as amended. When the contents of the record are so rearranged in the printed case, the brief should refer to the pages of the case, as well as to the pages of the record. By conforming to these rules, much time and expense will be saved, and this court greatly aided in ascertaining the points involved. What has been said is not so much in reference to this case, as a general announcement, which it is hoped will be cheerfully followed.

We fully concur with the conclusion of the trial court, to the effect that the false representations alleged in the answer and found in the special verdict consisted merely of an oral promise made by the plaintiff's agent at the time not to sell a soda fountain to certain other parties in Wausau. Such alleged false representations did not relate to any existing fact *in præsenti*, but only to future sales. Such false promise was no ground for avoiding the written contract. It is entirely unlike a case where a merchant orders goods, knowing himself to be insolvent, without disclosing his insolvency, with the preconceived purpose of not paying for them at all, as in *Lee v. Simmons*, 65 Wis. 523, relied upon by counsel. In such case the existing fact of known insolvency is the important factor. For the reason given the trial court properly disregarded the special verdict found by the jury.

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We further agree with the learned trial court that the plaintiff did not have the soda fountain manufactured and in stock when the order was received by him, but that, to fill the order according to the contract, it would have been necessary for the plaintiff to have manufactured certain parts of the soda fountain, and constructed the same. In other words, the contract was executory for the manufacture of the particular soda fountain specifically described therein. It is undisputed that, prior to the time when the order was countermanded and the contract thus broken by the defendants, the plaintiff had done nothing towards the performance of the contract, and in fact had not received the order. Such being the facts, we fully concur with the trial court in holding, in effect, that the plaintiff had no legal right, after the defendants had thus notified him that they would not accept the soda fountain and countermanded the order, to go on and manufacture and ship the same, for the purpose of holding the defendants for the full contract price, or to increase the damages for the breach. To hold otherwise would practically convert the action for the breach of the contract into an action to enforce the specific performance of the contract. We therefore agree with the trial court, and hold that the plaintiff's legal right to perform the contract was terminated when the defendants so countermanded the order, and that thereupon the plaintiff was relegated to his action for his damages sustained by reason of such breach. *Cameron v. White*, 74 Wis. 425.

The question recurs, What is the true measure of damages in such a case? The trial court held that the correct measure of damages in cases of this kind is the difference between the contract price and the market price of the soda fountain; that is to say, six cents. The difficulty in applying such a rule in such a case is apparent from another portion of the opinion mentioned, where it is said that at the time of the breach "there was no property in existence to which the contract could apply." If, as indi-

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cated, the plaintiff had no legal right, after the order was countermanded, to manufacture the soda fountain, in order to compel the defendants to pay the full contract price, then, for the same reason, the defendants had no right to deduct from the contract price what the plaintiff would have realized had he manufactured the same as specified in the contract and then sold it in the market. So we think, in a case like this, the measure of damages sustained must be the same as though the plaintiff had not manufactured the soda fountain at all. The defendants, having thus broken their contract, are manifestly bound to make good the loss which the plaintiff actually sustained by reason of such breach. Such loss is necessarily equivalent to the net profits which the plaintiff would have realized had the contract been performed by both parties. If this were not so, a contract otherwise valuable would, by construction, be rendered valueless. The case of *Hinckley v. Pittsburgh Steel Co.* 121 U. S. 275, is directly in point. Mr. Justice BLATCHFORD, speaking for the whole court, there said: "Actual damages clearly include the direct and actual loss which the plaintiff sustains *propter rem ipsam non habitam.* And, in case of a contract like this, that loss is, among other things, the difference between the cost of doing the work and the price to be paid for it. This difference is the inducement and real consideration which causes the contractor to enter into the contract. For this he expends his time, exerts his skill, uses his capital, and assumes the risks which attend the enterprise. And to deprive him of it, when the party has broken the contract and unlawfully put an end to the work, would be unjust. There is no rule of law which requires us to inflict this injustice. Whenever profits are spoken of as not a subject of damages, it will be found that something contingent upon future bargains, or speculations, or states of the market, are referred to, and not the difference between the agreed price of something

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contracted for and its ascertainable value or cost." To the same effect is *Cameron v. White*, 74 Wis. 431, 432. Mr. Justice TAYLOR, speaking for the court, there said: "The plaintiffs took no steps to perform the contract after they were notified by the defendant that he refused to perform it on his part. The rights of the parties under the contract were fixed at that time. . . . That the profits which the plaintiffs could have made on the contract, if they had been permitted to perform the same, is the correct rule of damages, and the one most in accordance with equity, is apparent from many considerations." To the same effect is *Corbett v. Anderson*, 85 Wis. 224, and cases there cited; and we do not think there are any cases in this court to the contrary. True, the plaintiff in this case manufactured, shipped, and tendered the soda fountain to the defendants, and thereupon brought this action for the whole contract price. It may be that the complaint is technically defective, by failing to specifically allege such loss or damage; but the plaintiff was allowed to prove, without objection, that he would have realized, upon the performance of the contract, a net profit of at least $100. Had such objection been made, the trial court would undoubtedly have allowed the complaint to be amended in that particular. For the purposes of this appeal, it must be deemed to be so amended.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

NEWMAN, J. It is a mistake to treat the order upon which this action is founded as an order for a soda-water fountain to be manufactured. A soda-water fountain, as such, whether completed or to be manufactured, is not mentioned in the order. The order is, "Forward the following described soda-water apparatus," as of something already manufactured and in stock. This is followed by

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the mention of several specific articles, such as go to make up a complete soda-water fountain. These are all such articles as can be bought in the market, and are usually kept in stock by those engaged in that business. They are not referred to in the order as things to be made or completed or fitted. On its face, the order is for goods in existence, and not for goods to be made. There is nothing in the case which shows that these goods could not be bought in the market, nor that they were in any way peculiar or unusual, nor that they were not readily salable for the price which the defendants were to pay for them. Doubtless, the plaintiff should recover such damages as he shows to have been the natural result or consequence of the refusal of the defendants to receive the goods. These are such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. *Brown v. C., M. & St. P. R. Co.* 54 Wis. 342, 353. Both parties evidently considered these goods as such as could be bought and sold readily in the market, and could have naturally contemplated no further damage to the plaintiff than that he lost the sale of his goods. It was not in contemplation that the goods were not, at the time of the breach of the contract, readily salable in the market. Nor does the evidence show that they were not so readily salable. In such a case the rule of damages is the difference between the value of the goods at the time of the refusal to receive them and the price agreed upon. *Ganson v. Madigan*, 13 Wis. 67–72; *Chapman v. Ingram*, 30 Wis. 290; *Gordon v. Norris*, 49 N. H. 376; *Allen v. Jarvis*, 20 Conn. 38, 53; 21 Am. & Eng. Ency. of Law, 576 *et seq.* The evidence does not show that the goods were not worth the agreed price. The circuit court fixed the plaintiff's damages by the proper measure.

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BARNARD, Plaintiff in error, vs. THE STATE, Defendant in error.

October 31 — November 13, 1894.

CRIMINAL LAW AND PRACTICE. (1) *Motion in arrest of judgment.* (2, 3) *Pleading: Act "unlawfully" done.* (4) *Reception of verdict: Notice to counsel.* (5–8) *Instructions to jury: Testimony of child: Reasonable doubt.* (9) *Sufficiency of evidence.*

1. A motion in arrest of judgment can be founded only on defects which appear on the face of the record, and not upon errors occurring on the trial which can be made apparent only by a bill of exceptions.
2. An information for the offense described in sec. 4382, R. S. (providing that "any person who shall unlawfully and carnally know and abuse any female under the age of twelve years, shall be punished," etc.), need not charge that the act was done unlawfully, it being a crime at common law and manifestly illegal.
3. The word "feloniously" in an information for such an offense is fairly equivalent to the word "unlawfully."
4. Where the verdict in a criminal case is received in regular session, it is not necessary that the defendant's attorney be notified so that he may be present.
5. Where the evidence was clear and undisputed that the crime in question had been committed by some one, it was not error for the court to say to the jury that the evidence showed that fact and it was conceded by defendant's counsel. If counsel did not in fact concede it, he should at once have called the attention of the court to the mistake.
6. On a trial for an assault upon a girl seven years old, it is *held* not to have been an abuse of discretion to permit her to testify as a witness, she appearing to have had the degree of intelligence that is usually possessed by girls of that age.
7. It was not error in such case to charge the jury: "You will not take and consider her statements, if they are contradictory and inconsistent, as you would those of a mature person; but you must take them as the statements of this little girl, given under the circumstances as you have seen, and must weigh them in connection with all the other testimony in the case."
8. After the jury had been instructed that defendant should be acquitted unless the testimony convinced them beyond a reasonable doubt of the existence of all the facts necessary to show him guilty

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of the offense charged, or of the offense of which they found him guilty, it was not error to charge them further that if they were not satisfied beyond a reasonable doubt that he was guilty of rape, but were "satisfied from the testimony" that he assaulted the girl with the intent of committing a rape upon her, it was their duty to acquit him of the greater offense and find him guilty of an assault with intent to commit rape.

9. Where the trial judge has held the testimony sufficient to sustain a verdict of guilty, and it is not made to appear in this court that it was insufficient, the judgment will not be disturbed.

ERROR to the Circuit Court for *Marinette* County.

The defendant was tried on the following information: "I, Hiram O. Fairchild, district attorney for said county, hereby inform the court that on the 19th day of April, 1893, at said county, *John Barnard* did, upon one Jennie Vander Bogart, a female child under the age of twelve years, feloniously make an assault, and her, the said Jennie Vander Bogart, then and there feloniously did carnally know and abuse, against," etc. The verdict was: "Guilty of an assault with intent to commit rape." Motions in arrest of judgment and for a new trial were denied. Judgment was entered and sentence passed. To review the judgment the defendant has sued out this writ of error.

The cause was submitted for the plaintiff in error on the brief of *Thos. R. Hudd*, and for the defendant in error on that of the *Attorney General.*

Counsel for the plaintiff in error contended, *inter alia*, that the information is for the statutory offense described in sec. 4382, R. S., and is fatally defective in not charging the offense to have been *unlawfully* committed. *State v. Delue*, 2 Pin. 204. The use of the word feloniously will not suffice. Archb. Crim. Pl. 62; *State v. Card*, 34 N. H. 510; *Allen v. State*, 85 Wis. 25; *Owens v. State*, 83 id. 496. An information on a statute must pursue the precise and technical language employed in the statute in the description of the offense. *Ike v. State*, 23 Miss. 525; *In re Booth*,

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3 Wis. 157; *State v. Welch*, 37 id. 196; *Steuer v. State*, 59 id. 472; sec. 4650, R. S., note.

For the defendant in error it was argued, among other things, that the use of the word "unlawful" is unnecessary, because the crime existed at common law and is manifestly illegal. 1 Chitty, Crim. Law, *241; *Reg. v. Prince*, L. R. 2 Cr. Cas. Res. 161; *Curtis v. People*, 1 Ill. 256. An act charged as done feloniously is necessarily charged as done "unlawfully." *Fairlee v. People*, 11 Ill. 5; *Skaggs v. State*, 108 Ind. 53.

NEWMAN, J. The plaintiff in error propounds three grounds of error in the denial of the motion in arrest of judgment: (1) Because the information does not charge any offense known to the law, or as required by the statute in such case made and provided. (2) That the verdict was not rendered, received, or recorded as by law and practice of the court is provided. (3) That the record does not show that the attorney for the defendant was in court when the verdict was rendered, received, and recorded, and that said attorney was not notified to be in attendance. Only the first ground stated could be ground for a motion in arrest of judgment. Motion in arrest of judgment can be founded only on defects which appear on the face of the record. 1 Bish. Crim. Proc. (3d ed.), § 1285; 12 Am. & Eng. Ency. of Law, 147*b*, and notes. The motion does not lie for errors occurring on the trial, such as can be made apparent only by a bill of exceptions.

The statute on which the information was intended to be founded is R. S. sec. 4382: "Any person who shall unlawfully and carnally know and abuse any female under the age of twelve years, shall be punished," etc. The information omits the word "unlawfully." It is claimed that by reason of that omission it fails to charge any offense known to the law. The rule governing this question is stated by

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Chitty as follows (1 Chit. Crim. Law, *241; *Reg. v. Prince*, L. R. 2 Cr. Cas. 161): "The term 'unlawfully,' which is frequently used in the description of the offense, is unnecessary whenever the crime existed at common law and is manifestly illegal. But if a statute, in describing the offense which it creates, used the word, the indictment founded on the act will be bad if it is omitted." This is quoted by Bishop (1 Crim. Proc. 3d ed. § 503) as the law here. The offense with which the defendant is charged is a crime at common law. 2 Bish. Crim. Law (8th ed.), § 1133; *People v. McDonald*, 9 Mich. 150. It was not created an offense by statute. And the act is manifestly illegal. Under no circumstance could it be lawful. So it was not necessary to charge the act as being "unlawfully" committed. Besides, the word "feloniously," which is used, is fairly equivalent, in connection with the illegal act charged, to the word "unlawfully," for the purpose of charging the manifestly illegal act to have been "unlawfully" done. This has been so held in many cases, some of which are cited in the brief of the defendant in error.

It never has been the law of this state that the attorney of the defendant must be notified so that he can be present at the reception of the verdict received in regular session. *Smith v. State*, 51 Wis. 615; *Martin v. State*, 79 Wis. 165.

The motion in arrest of judgment was properly overruled.

The motion for a new trial was made on the following grounds: (1) Because the instructions of the court were erroneous, misleading, and contrary to the law. (2) That the verdict is contrary to the evidence, and not supported by the evidence or the law. (3) The court erred in the exclusion of evidence and in the admission of evidence.

The first instruction of which complaint is made is that the court said to the jury: "The testimony is of such a

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character as to clearly establish,—and it is a conceded fact, conceded by counsel for the prisoner,—that on the 19th of April last some person did assault and abuse this little girl; that she was injured by some man in the shed that has been described by the testimony, on that day." The fact seems to have been fully established by the evidence, so as not to be fairly disputable. It does not seem to have been disputed. If counsel did not in fact concede it, he should at the time have called the attention of the court to the mistake, and not have waited until it was too late to correct it. It was not an error to say that the evidence was sufficient to establish it, when the evidence, in fact, was clear and undisputed, as in this case.

Several instructions which relate to the testimony of the injured girl are excepted to. She was a little girl, only seven years old. She seems to have had such degree of intelligence as is usually possessed by girls of that age. She was very ignorant of the nature of the offense which was committed against her, and of the actual fact of what was done. She knew she was hurt. She thought she was cut with a knife. She made contradictory statements when pressed and confused by cross-examination. In *State v. Juneau*, *ante*, p. 180, this court held that it is within the discretion of the trial court to admit a child of five years to be sworn and testify. It is a matter of intelligence rather than of age. It was said that it will require a strong case to sustain a reversal of the trial court which examines such a witness as to his intelligence and admits him to be sworn. This case does not disclose such a strong case of abuse of discretion as will require or justify a reversal of the conviction on that ground. After she had been admitted to be sworn and testify, the credit due to her testimony was to be tested by the ordinary rules by which the credit of testimony is tried. Her age, her intelligence, her manner on the stand, her contradiction, and

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all the incidents which go to test and determine the credit due to witnesses were applicable to her testimony. It could not be arbitrarily rejected. It was to be weighed by the jury and given such weight as the jury deemed it justly entitled to. The court said to the jury: "You will not take and consider her statements, if they are contradictory and inconsistent, as you would those of a mature person; but you must take them as the statements of this little girl, given under the circumstances as you have seen, and must weigh them in connection with all the other testimony in the case." This could not well mislead the jury. They were told, in effect, not to consider the contradictory statements and inconsistencies of this immature witness as they would consider the contradictory statements and inconsistencies of a mature witness; but should remember that she was a little girl, giving her testimony of a distressing outrage upon herself under trying circumstances: "Given under the circumstances as you have seen." It should not be necessarily fatal to the entire credit of her testimony if, under such circumstances and in the trying situation and bewilderment of skilful cross-examination, such a child should make contradictory and inconsistent statements. If the jury believed her to be truthful, and not intentionally false, they should credit the truth which they found to be in her testimony, notwithstanding its shortcoming when compared with the testimony of more mature witnesses.

The court told the jury, if they were not satisfied beyond a reasonable doubt that the defendant was guilty of the completed offense of which he was charged, "but are satisfied from the testimony that he assaulted her with the intent of criminally knowing her, or of committing a rape upon her, then it is your duty to acquit him of the greater offense and find him guilty of an assault with intent to commit a rape." It is objected to this instruction that it

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ignores the principle that, to justify a conviction of the lesser offense, the jury must be satisfied beyond a reasonable doubt that he is guilty of that offense. But the court had previously instructed, charging on the subject of the presumption of innocence, that the presumption of innocense "entitles him to your verdict unless the testimony, as a whole, convinces you beyond a reasonable doubt of the existence of all the facts necessary to show him guilty of the offense charged, or of the offense of which you find him guilty." That is a clear and correct instruction on the point claimed to have been overlooked in the other paragraph of the charge. It did not need to be repeated. The jury may be presumed to have understood and remembered it.

It is insisted for the plaintiff in error, "that the jury in this case never took into consideration the doubts in the case is clear and undeniable." The trial judge evidently took a different view of this matter. He seems to have been satisfied that the jury had fairly considered the testimony, and had had their doubts removed by it. He deemed the testimony sufficient, and sustained the verdict. That is sufficient to sustain the judgment in this court, where it is not made to appear that the testimony was insufficient.

The record shows that the defendant was present in court when the verdict was received and the jury discharged. The plaintiff in error was mistaken in regard to that fact.

No reversible error is found in the record.

By the Court.—The judgment of the circuit court is affirmed.

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KOLLOCK and another, Plaintiffs in error, vs. THE STATE, Defendant in error.

October 31 — November 13, 1894.

Criminal law and practice: Circumstantial evidence: Instructions to jury: Admissions by one of two defendants.

1. When circumstantial evidence is relied upon for conviction in a criminal case, each of the several circumstances upon which the conclusion of guilt necessarily depends must be proven beyond a reasonable doubt, and they must not only point with moral certainty to the guilt of the defendant, but must exclude, to a moral certainty, every other reasonable hypothesis; and instructions embodying these principles should be given if requested.
2. An admission of his own guilt by one of two defendants is not evidence against the other.
3. On a trial for feloniously burning a barn, admissions by defendant that he had previously burned the owner's hay and poisoned his horses bear upon the question of malice only, and do not tend to prove the commission of the crime charged.

ERROR to the Circuit Court for *Portage* County.

Arson. The plaintiffs in error, *Henry Kollock* and *Shepard Kollock*, were convicted of feloniously burning the barns of one Springer, August 25, 1893, and sentenced to imprisonment in the state prison, and they have sued out this writ of error to reverse that judgment.

The plaintiffs in error were neighbors of Springer, living about half a mile from him on the same road. For years there had been ill feeling between the *Kollocks* and Springer. The barns burned about 1:30 o'clock A. M. Threshing had been going on in one of the barns during the forenoon of the day before the fire. There was some evidence that Springer was smoking in or about the barn during the threshing, but this was denied by Springer. Other than this, there was no evidence that there had been any fire or light about the barn prior to the fire. There

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was evidence that both of the *Kollocks* had previously threatened to burn Springer out. There was also evidence by Springer that after the fire he met *Henry Kollock*, and said to him, "You did burn me out, didn't you?" to which *Kollock* answered, "Yes." There was also evidence that four of Springer's horses were poisoned in 1889 by some unknown person, and that in 1887, and again in 1891, a large quantity of his hay was destroyed by fire. This evidence was followed by evidence of witnesses who testified to hearing a conversation between *Henry Kollock* and his brother Nelson Kollock, in 1891, in which Nelson said to *Henry*, referring to Springer, "You are even with him now. You have poisoned his horses and burned his hay,"—to which *Henry* made no denial, but said he would get more than even with him. All of these threats and admissions were denied. There was also evidence given by a hired girl who lived at *Kollocks'* house at the time of the fire, that she was awakened by the light shining in her room, and went to the window, and saw the defendants returning to their house from the direction of Springer's barns, and heard them come into the house. This was also denied. The foregoing is substantially all of the evidence on the trial which tended to inculpate the defendants.

The cause was submitted for the plaintiffs in error on the brief of *Cate, Jones & Sanborn*, and for the defendant in error on the brief of *Byron B. Park*, district attorney, and that of the *Attorney General* and *J. M. Clancey*, Assistant Attorney General.

WINSLOW, J. In this case the state relied for conviction almost entirely upon circumstantial evidence. As to the defendant *Henry* there was, in addition to the circumstantial evidence, some proof of an admission of the fact, but as to *Shepard Kollock* the evidence was exclusively circumstantial. There are two legal principles applicable to

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such evidence, which are very well established: First, that each of the several circumstances upon which the conclusion of guilt necessarily depends must be proven beyond a reasonable doubt; and, second, that they must not only point with moral certainty to the guilt of the defendant, but must exclude, to a moral certainty, every other reasonable hypothesis. *Comm. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711, and cases cited in note; 3 Rice, Ev. §§ 346–348. Instructions embodying these principles were requested on behalf of the defendants, and refused. Nor was the substance of either of them given. Upon the subject of circumstantial evidence, the court instructed the jury as follows: "Circumstantial evidence tending to establish the guilt of the accused is always competent, and is to be considered by the jury in connection with all the evidence, and given such weight and effect as the jury believe it should receive, in view of all the facts as established to their satisfaction by all the evidence, and no more. Crimes that are perpetrated in secret and under cover of darkness are frequently, perhaps usually, of necessity proven, if at all, in whole or in part from circumstances that tend, when construed in connection with each other or with other established facts, to establish the guilt of the accused. So far as proof of guilt necessarily depends upon proof of circumstances tending to establish guilt, the rule of law is that to warrant a verdict of guilty the jury should be satisfied that such circumstances proven must, when given a reasonable construction, point with a moral certainty to the guilt of the accused; that they must, construed together and construed in connection with the facts *established by other or positive evidence*, if any there be, be consistent with the guilt of the accused and inconsistent with his innocence. This rule, so far as it is applicable to the evidence in the present case, should be remembered and observed; but you are cautioned that it does not follow

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from this rule that every circumstance proven by the state in a particular case must necessarily point to the defendant's guilt, because circumstances may be proven to have transpired which have no necessary connection with others, nor with the guilt or innocence of any particular person. But the substance and effect of the rule is, so far as applicable to the case before you, that upon the whole evidence in the case, whether direct and positive, or circumstantial only, or both, you must be convinced of the defendants' guilt beyond a reasonable doubt, in order to justify a verdict of guilty; and, if not satisfied that your verdict should be guilty, a verdict of not guilty must necessarily follow."

It will readily be seen that the two legal principles before cited were not given to the jury, either in substance or effect. As before observed, the evidence against *Shepard Kollock* was purely circumstantial, so that there can be no doubt of the application of these principles to his case. As to *Henry Kollock*, there was proof of an admission by him in addition to the circumstantial evidence. This admission was strenuously denied, and in case the jury disbelieved that it was ever made, as they might reasonably do, then the case against him also was purely circumstantial, and he also should have the benefit of the proper instructions on the subject of circumstantial evidence.

Other questions are raised, but are not deemed necessary to be decided. We deem it proper, however, to say that the charge seems to treat the alleged admission of *Henry* as evidence against both defendants. It is, of course, only evidence against *Henry*. And, as to the alleged admission of previously burning Springer's hay and poisoning his horses, they manifestly only bear upon the question of *Henry's* malice, and do not tend to prove the commission of the crime charged. These limitations should be given to the jury upon another trial.

By the Court.—Judgment reversed, and cause remanded

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for a new trial. The warden of the state prison will surrender the plaintiffs in error to the sheriff of Portage county, who will hold them in custody until they shall be discharged by due course of law.

DEAN and others, Appellants, vs. BROOKS, Respondent.

September 5 — December 11, 1894.

Vendor and purchaser of land: Setting aside deed for fraud.

The evidence in this case is *held* to show that a conveyance by an heir of his interest in the estate of his ancestor, made in ignorance of the value of lands devised by the ancestor for public parks and of an arrangement for contesting the validity of the devise, was induced by concealment, deceit, and misrepresentation, and should be set aside.

APPEAL from the Circuit Court for *Douglas* County.

Peter Dean died at his residence in Duluth, January 4, 1884. He left no widow or children. He had four brothers and one sister, to wit, Thomas, Dennis, John, Alexander, and Mary. Thomas and Mary were still living, and resided in New York City. Dennis was still living, and resided at Superior. John and Alexander were both dead, and each left three children as his heirs at law. The children of Alexander all resided in New York City. The children of John resided in Milwaukee and Cleveland.

On January 1, 1884, the said Peter Dean executed his last will and testament, wherein, after providing for his debts, funeral expenses, and a monument, he bequeathed to his sister, Mary, his copper and bank stocks and money sufficient therewith to amount to $25,000. He devised to the city of Superior 240 acres of land, to be used by the city for public purposes, and to Duluth certain lots in trust

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to be sold and the proceeds thereof used for the purchase and beautifying of parks in Duluth for the use of the inhabitants of said city. Said real estate, in the aggregate, was of the value of $80,000. On February 6, 1884, said will was admitted to probate, and August 25, 1887, a final settlement of the debts, legacies, and expenses of said estate was made, but the residue thereof was not disposed of.

The defendant is the son-in-law of said Dennis, and resides at Superior. In the winter of 1889 the defendant and his father-in-law, Dennis, believing that the devises to Duluth and Superior were void, commenced negotiating for the purchase of the interest which the three children of the deceased brother John had in said estate. The result of said negotiations was that on or about April 20, 1889, the defendant obtained from the three children of John a conveyance of their interest in said estate, as mentioned in the case of *Allen v. Brooks*, *ante*, p. 265. The defendant called upon the plaintiff, Thomas, in New York, April 23, 1889, and commenced negotiating with him for the purchase of his interest in said estate, and, as a result, the plaintiff, on or about August 7, 1889, agreed to sell and convey, and thereupon did sell and convey, his interest in said estate to the defendant for $300 cash, and, in case the defendant acquired title by law, then $900 in addition.

On August 8, 1890, Dennis, Mary, the three children of Alexander, and the defendant began a suit in the circuit court for Douglas county against the city of Superior to have said devise to Superior declared to be void. On October 22, 1890, the circuit court overruled a demurrer to the complaint therein. The defendant thereupon answered, and on the trial the circuit court found and held that said devise to Superior was void, and judgment was thereon entered accordingly, and the said city thereupon appealed from said judgment to the supreme court, and, pending that appeal, the same was settled by the parties. On June

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5, 1891, the said Dennis, Mary, the three children of Alexander, and the defendant petitioned the probate court of St. Louis county to have said devise to Duluth declared void, and upon the hearing thereof, after due notice, the same was, August 4, 1891, declared to be void.

After the circuit court for Douglas county held the devise to Superior void, the plaintiff tendered back to the defendant the consideration for the deed mentioned, and demanded a reconveyance, on the ground that such deed had been so obtained by fraud and deceit practiced by the defendant upon the plaintiff, and thereupon commenced this action to set aside said deed, upon the grounds mentioned. The defendant answered, and on the trial the court found, in effect, that the evidence failed to show such fraud or deceit, and rendered judgment in favor of the defendant, from which judgment the plaintiff, Thomas, appealed to this court. Pending the appeal, Thomas died, and thereupon his three children and heirs at law were substituted as plaintiffs in his place.

For the appellants there was a brief by *Reed, Grace & Reed* and *John O. Winship*, and oral argument by *H. H. Grace* and *Mr. Winship*.

Champ Green, for the respondent.

The following opinion was filed October 2, 1894:

CASSODAY, J. In September or October, 1888, the defendant married the daughter of the testator's brother Dennis. Dennis had no other child, and from that time on he made his home with the defendant in Superior. Soon after the marriage, if not before, Dennis made an arrangement with an attorney at Superior to test the validity of the devises mentioned in the foregoing statement. That arrangement, according to the testimony of Dennis, was to the effect that the attorney should prosecute the suit and pay all costs and expenses, and have for his compensation

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one third of all he might recover as the share of Dennis. It appears to have been understood, however, at the time, that Dennis should try and induce the other heirs to join in making such contest. Dennis appears to have been in poor health, and accordingly wanted the defendant to join with him in securing from the estate what he could, and so communicated the arrangement he had so made with his attorney to the defendant, and suggested that he should become interested in the enterprise. Soon after, Dennis visited the heirs in New York, and sought to induce them to join in making the contest. They were all in good financial circumstances, except Thomas. He was over seventy years of age, had no property, and in 1889 was working as a janitor of a school building, at $92 per month. He had two daughters, living with him at the time, and a son. In January, 1889, Dennis visited his nephew in Milwaukee, and induced him, in behalf of himself and his two sisters in Cleveland, to open correspondence and negotiations with the defendant for the sale and conveyance to him of their interest in the estate. Such sale, after considerable correspondence, was finally consummated in a personal interview between the defendant and the nephew in Milwaukee, April 20, 1889. Three days afterwards, the defendant called upon Thomas, in New York, and told him he had bought out the Milwaukee and Cleveland heirs upon the terms mentioned, and offered to buy out his interest on the same terms. Thomas replied that he would do as his sister Mary did, or that he would think it over and probably do as Mary and Dennis advised. There is no claim that Thomas was informed as to the value of the lands so devised, nor that the defendant's attorney's fee of $3,000 was contingent upon recovery. The defendant testified to the effect that he *thinks* he told Thomas of the arrangement which Dennis had made with his attorney, but such testimony is inconsistent and far from being plausible.

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Besides, it is contrary to the whole tenor and effect of the testimony given by Thomas. According to his testimony, there was not a word said to him about contesting, nor that there was any plan to contest it. He also testified to the effect that the defendant intimated that the property did not amount to much,—that a good deal of it was given to the authorities for a park. Under such circumstances, Thomas, through his sister's husband and Dennis, accepted the proposition so made to him by the defendant nearly four months previously; and thereupon the defendant wrote Thomas, under date of August 7, 1889, to the effect that he would make out and forward papers for his signature, and pay the consideration upon delivery of the deed to the bank; that matters stood the same as when he was in New York; that little could be done unless all joined in a determined effort to secure their rights; and stating in a postscript, among other things, "I enclose in deed all property filed in probate office, though *the better* part has unquestionably been sold and condemned." On cross-examination, the defendant quibbled about this statement, but virtually conceded that it was false as written. This false statement in the letter corroborates the testimony of Thomas as to the conversation between him and the defendant. It is very important whether Thomas was induced to make the sale upon the representation that "*the better* part" of the lands had been "sold and condemned," or that only "part" of the lands had been "sold and condemned." It appears that the defendant put in evidence a supposed copy of the letter in which the words "*the better*," in italics, were omitted, and that subsequently the plaintiff put in evidence the original letter; and that it was thereupon "agreed by the parties that the original letter to Thomas Dean, dated August 7, 1889, should be substituted for the copy." Nevertheless, the learned trial court, by some inadvertence, appears to have overlooked the fact, and so finds that the copy was the letter sent.

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Such is a general outline of the leading facts in evidence. We refrain from going into details, but are all constrained to believe that Thomas was induced to make the conveyance by the concealment, deceit, and misrepresentation of the defendant and those acting in conjunction with him. This is the only question calling for consideration in the case.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with direction to enter judgment according to the prayer of the complaint.

A motion for a rehearing was denied December 11, 1894.

EDWARDS & MCCULLOCH LUMBER COMPANY and others, Appellants, vs. MOSHER and others, Respondents.

September 12 — December 11, 1894.

Land contract: Vendor's interest subject to mechanic's lien.

By the terms of a land contract nothing was paid down, but the vendee was required to erect a building at once, and the title to both the building and the land was to remain in the vendor until full payment was made. *Held*, that the vendor was the owner of the premises within the meaning of ch. 349, Laws of 1885, and his interest was subject to liens for labor performed and materials furnished in the erection of such building. WINSLOW J., dissents, being of the opinion that the vendor's claim is a lien and is prior to the liens for labor and materials.

APPEAL from the Circuit Court for *Douglas* County.

Actions to enforce liens for labor and materials. The facts are stated in the opinion. The plaintiffs appeal from the judgment.

Frederick H. Remington, for the appellants, argued, among other things, that the *Land & River Improvement Company* is the "owner" of the property within the mean-

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ing of sec. 3314, R. S., as amended by ch. 349, Laws of 1885, citing, besides cases cited in the opinion, Bouvier, Law Dict. tit. OWNER; Phillips, Mech. Liens, §§ 70, 71, 83, 84; *Dutro v. Wilson*, 4 Ohio St. 102; *Nordyke & M. Co. v. Hawkeye W. M. Co.* 53 Iowa, 521; *Alley v. Lanier*, 1 Coldw. 540; *Hinckley v. Field's B. & C. Co.* 91 Cal. 136; *Lozo v. Sutherland*, 38 Mich. 168; *Hilton v. Merrill*, 106 Mass. 528; *Wisconsin R. L. D. Asso. v. D. F. Comstock L. Co.* 72 id. 464, 467; *Wheaton v. Berg*, 50 Minn. 525; *Wells v. Calnan*, 107 Mass. 514. For cases in other states holding that a mechanic's lien extends to a vendor's interest, see *Henderson v. Connelly*, 123 Ill. 98; *Hill v. Gill*, 40 Minn. 441; *Bohn Mfg. Co. v. Kountze*, 30 Neb. 719; *Hickey v. Collum*, 47 Minn. 565; *Harlan v. Stufflebeem*, 87 Cal. 508; 1 Warvelle, Vendors, 209; *Leonard v. Cook*, 20 Atl. Rep. 855; *O'Leary v. Roe*, 45 Mo. App. 567; *McCue v. Whitwell*, 156 Mass. 205; *Carew v. Stubbs*, 155 id. 549.

For the respondents there were briefs by *F. W. Downer, Jr.*, and *Spooner, Sanborn & Kerr*, and oral argument by *A. L. Sanborn*. They contended, *inter alia*, that the vendee in a land contract is to be regarded as the real owner, and the vendor merely as holding the title in trust as security for the purchase price. 1 Warvelle, Vendors, 195, 206; *Church v. Smith*, 39 Wis. 492; *Northrup v. Trask*, id. 515, 519; *Diggle v. Boulden*, 48 id. 477; *Farber v. Purdy*, 69 Mo. 601; *Sherman v. Savery*, 2 Fed. Rep. 505. If the rule of *Rees v. Ludington*, 13 Wis. 276, is held to have been changed by the act of 1885, the result of such ruling will be far reaching. If the vendor, holding the title as trustee merely, is to be regarded as an owner, and his interest is adjudged to be "the real property of a person on whose premises the improvements are made," then it will necessarily follow that the interest of the reversioner or remainder-man subject to a life estate, the interest of the ultimate owner in an executory devise, the interest of the

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land-owner over whose premises a railroad right of way has been granted, and the interest of the lessor in long leases for years, will be subject to be sold and divested, on the ground that each one of these persons is an owner, much more indeed an owner than the vendor, and if he consents, as in most cases he must be held to do, then the whole estate is liable to be sold through the acts of the owner of the present estate. That the vendor is not the owner, and that his interest is a lien and not subject to subsequent mechanic's liens, see *Hickox v. Greenwood*, 94 Ill. 266; *Campbell and Pharo's Appeal*, 36 Pa. St. 247; *Schuyler v. Hayward*, 67 N. Y. 253; *Hill v. Ressegieu*, 17 Barb. 162, 166; *Fitzhugh v. Maxwell*, 34 Mich. 138; *Champion v. Brown*, 6 Johns. Ch. 402; *Loonie v. Hogan*, 9 N. Y. 435; *Gay v. Brown*, 1 E. D. Smith, 725; *Wis. Planing Mill Co. v. Schuda*, 72 Wis. 277; *Kerrick v. Ruggles*, 78 id. 276; *Williams v. Lane*, 87 id. 152; *Superior Consolidated Land Co. v. Nichols*, 81 Wis. 656, 659; *Long Island B. Co. v. Arnold*, 28 Atl. Rep. 801; *People's S., L. & B. Asso. v. Spears*, 115 Ind. 297; *Getto v. Friend*, 46 Kan. 24; *Meyer Bros. Drug Co. v. Brown*, id. 543.

The following opinion was filed October 2, 1894:

ORTON, C. J. This is a consolidation of mechanics' lien cases and for materials for the erection and repairs of a store building and dwelling house on lots 24 and 25, in block 386, in West Superior, 17th division. The work was performed on said building and the materials furnished for the same in June, July, August, and September, 1891. The actions are brought against *William Mosher*, who had purchased the lots and held a contract for a deed as assignee, with the consideration of $900 wholly unpaid, and interest thereon, and a half of the same past due; and against *Neil Smith*, the assignee of said *Mosher;* and against the *Land & River Improvement Company*, a foreign corporation,

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which owned said lots June 1, 1891, and sold the same to one H. S. Bradford on that day for $900, one fourth payable annually, with interest at eight per cent.; and Bradford sold and assigned his interest in the land contract to said *Mosher* before the commencement of said building, and *Mosher* made the contract for the erection and construction of the same, and was personally liable for the several claims of the plaintiffs. The conditions of said land contract were that the said purchaser was to erect on said lots a dwelling house to cost not less than $900, to be commenced not later than the 15th day of June, 1891; that all the buildings and improvements that were then on said lots, or that should be thereafter erected thereon, should be and remain the property of said corporation, until the contract was performed, and on default of any payment, or of paying taxes, or of erecting said building, the agreement to be null and void, at the option of said corporation, and all payments made forfeited, and time was made the essence of the contract. The said corporation, in its answer, alleged "that for the purpose of securing the payment of said sum and the performance of said condition" it "*retained in itself the legal title to said premises.*" The plaintiffs claim a lien on the interest of said corporation in said building and said lots on which said building stands. The contract for said building was let, and the work on the same commenced, immediately on the making of said contract, and the building was completed on the 6th day of September thereafter. The plaintiffs obtained judgment of lien on said building and lots limited to the interest of the said *Mosher* and his assignee in the premises, and the court refused to render judgment as against the interest of said corporation in the same, holding that said payments and the performance of said conditions are a lien on the premises *prior* to the liens of the plaintiffs for work, labor, and materials on said building; and this presents the only question on this appeal.

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1. Previous to the enactment of ch. 349, Laws of 1885, and as the law then was, this court had decided that the interest of a person in real estate, not acquired after the mechanic's or other lien attached, upon which a building or other improvement was erected, could not be sold to satisfy such lien unless the person so interested was personally liable for the payment of the debt. *Rees v. Ludington*, 13 Wis. 276; *Wheeler v. Hall*, 41 Wis. 447; *Lauer v. Bandow*, 43 Wis. 556. The statute under which these cases were decided was amended by the above chapter as follows: "And shall also attach to and be a lien upon the real property of any person on whose premises such improvements are made, such owner having knowledge thereof and consenting thereto, and may be enforced as provided in this chapter."

2. Did the said corporation defendant hold such an interest in the premises as to be subject to said liens, within the purview of this amendment? In *Heath v. Solles*, 73 Wis. 217, it was held that this amendment extended the lien of mechanics and others so as to embrace the premises owned by the wife of the defendant who contracted the debt, she having knowledge of and consenting to the improvement made thereon by her husband. The late Mr. Justice TAYLOR uses this language in the opinion: "It is very evident that this statute was intended to change the law as theretofore existing in this state, as interpreted by the decisions of this court, by extending the lien of the mechanics and others *so as to extend and cover the interest of persons in the real estate* upon which the kind of improvements designated in said sec. 3314, R. S., were made, other than the person or persons incurring the debt for making such improvements. . . . Nor can there be any just cause of complaint by the owner of the real estate upon which the improvement is made. He has the whole benefit of the improvement made, and it is in furtherance of justice and equity that his property, which is presumed to have

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been enhanced in value by the labor or materials furnished, should pay for them." This language is certainly broad enough to embrace the interest of the defendant corporation in the real estate in question, but as authority it must be limited to embrace only the *full ownership* of the real estate by the wife,— the only and real question in the case. But it would seem to have been the opinion of Mr. Justice TAYLOR that any interest in the real estate owned by a third person might be subject to the lien, if he had knowledge of and consented to the improvement.

The words "the real property of any person" and the word "owner," in the amendment, must mean the same thing. "The word 'land' or 'lands,' and the words 'real estate' and 'real property,' shall be construed to include lands, tenements, and hereditaments, and all rights thereto, and interests therein." R. S. sec. 4971, subd. 9. In such a contract of sale the legal title to the property remains in the vendor. *Minneapolis & St. L. R. Co. v. Wilson*, 25 Minn. 382; 1 Black, Judgm. § 438. The word "owner" does not always mean absolute ownership. *Benjamin v. Wilson*, 34 Minn. 517; *Ombony v. Jones*, 19 N. Y. 234; *Choteau v. Thompson*, 2 Ohio St. 114; *Harman v. Allen*, 11 Ga. 45; *Hooker v. McGlone*, 42 Conn. 95; and other cases in appellants' brief. When the vendor has consented to the purchaser building on the premises, and he has given the purchaser a bond for deed on full payment, his interest in the land is subject to the mechanic's lien. *Davis v. Humphrey*, 112 Mass. 309; *McCue v. Whitwell*, 156 Mass. 205; *Carew v. Stubbs*, 155 Mass. 549. The vendor in such a case continues to be the owner of the land, subject to the equity of redemption in the purchaser, until the purchase money is paid. *Church v. Smith*, 39 Wis. 492; *Hinman v. Hartford F. Ins. Co.* 36 Wis. 159. The purchaser, having a mere equitable title, may also be called the owner. The interest of the purchaser is measured by the part of the

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purchase money paid, and that of the vendor by the part of the purchase money unpaid, and they may properly both be called the owner in respect to the mechanic's lien law as in respect to fire insurance. This would seem to be the import of the above case. The vendor in such case may maintain replevin for shingles manufactured from trees cut from the land by the vendee, as the owner of the shingles, and consequently the owner of the land. *Nelson v. Graff*, 12 Fed. Rep. 389. The interest of the vendor, as well as that of the vendee, may be sold under the lien. *Henderson v. Connelly*, 123 Ill. 98; *Hill v. Gill*, 40 Minn. 441; *Harlan v. Stufflebeem*, 87 Cal. 508. There are many other cases cited in appellants' brief. There may be cases in which it has been held otherwise. The vendor certainly holds in such case the title in fee simple, or he could not thereafter convey it to the vendee. A judgment against the vendor is a lien on his interest in the land, and it may be sold. 1 Warv. Vend. 203; 2 Freem. Judgm. § 363; *Kinports v. Boynton*, 120 Pa. St. 306. A judgment is a lien on the "*real property*" of every person against whom it is rendered and docketed. R. S. sec. 2902.

As a matter of course the vendor's interest in the land cannot be sold to satisfy the mechanic's lien unless he had knowledge of and consented to the improvement. But the land contract in this case would seem to make it very clear that the vendor's interest should be subject to the lien, whatever it may be called, in justice and equity, and within the terms of the amendment. (1) Nothing was paid down on the contract. (2) The vendor not only had knowledge of and consented to the building to cost $900, but required it to be built as one of the conditions of the contract. (3) The vendor retains the legal title to the lots, and obtains also the ownership of the building, until the purchase money is fully paid. (4) The vendor was the full and absolute owner of the lots when he contracted for the construction

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of this building on them, and thus brings himself within the terms of the statute. (5) The vendor required the erection of the building for his own benefit, and when built it was to belong to him, as well as the lots, as security for the purchase money. What interest remained in the purchaser? He had a mere naked equity of redemption, burdened by the payment of $900 and interest, and the building of a $900 house on the premises. The purchaser had paid nothing down. Was he the owner of the premises, and the vendor not the owner, when the vendor had much the greater interest in it,—in fact, nearly all the interest there was in it? If, to give effect to the lien law, the purchaser under such a contract must be treated as the owner, how much more ought the vendor to be treated as the owner?

It seems to be very clear that the defendant corporation has an interest in or ownership of the lots under this contract of sale that is subject to the plaintiffs' liens, and that it can properly be called the owner of the premises, within the purview of ch. 349, Laws of 1885. In so holding we place great weight upon the peculiar conditions of the contract of sale, and only so construe the statute in special reference to this case.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with direction to render judgments of lien against all of the defendants and their several interests in the premises, and that they may be sold to satisfy the said liens.

PINNEY, J., took no part. WINSLOW, J., dissents. The following opinion was filed October 19, 1894:

WINSLOW, J. I entirely agree with the very lucid opinion filed by the circuit judge in this case. After reviewing the authorities, he comes to the following conclusion: "A conclusion is therefore reached that the claim of the *Land*

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& River Improvement Company is a lien, within the meaning of sec. 3314, and not real property, as strictly so called; it is a mere claim or debt so far as relates to the purchase money yet unpaid secured by the contract; and that, if such interest was held by an individual, it would be devisable and descendible as personal property in case of the death of the owner, secured, however, by the legal title to the land held in trust, which trust character would follow it. Treating the vendor's claim in the land contract as a lien, there being no controversy but that it originated prior to the commencement of the construction of the building, it is, by the express words of the statute, made superior to the lien claims." This being my opinion, I cannot concur in the reversal of the judgment.

A motion for a rehearing was denied December 11, 1894.

FALCK, Respondent, vs. MARSH, Appellant.

October 25 — December 11, 1894.

Ejectment: Counterclaim for improvements: Grantee of life tenant by quitclaim deed: Adverse possession.

In ejectment the grantee of a life tenant by quitclaim deed cannot counterclaim for the value of improvements made and taxes paid by him while holding under such deed, as against the owner of the fee. Such a deed cannot be made the basis of an adverse holding of the fee in remainder.

APPEAL from the Circuit Court for *Brown* County.

Ejectment. One Sarah Perrin, who died intestate in March, 1865, was the owner of the premises in question at the time of her death. She left surviving her a husband, Michael Perrin, and five children. Michael died August 26,

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1891. In February, 1893, the plaintiff acquired by deed from all the heirs at law of Sarah Perrin the title in fee of the premises. The defendant was then in possession, and had been so for some years, claiming under a deed from Michael Perrin and his then wife, dated February 2, 1886. This deed was in substance a quitclaim deed by which Michael granted, bargained, sold, remised, released, and quitclaimed to the defendant *all the estate, right, title, claim, and demand of the parties of the first part* in and to the premises in controversy, and contained no covenants except as against the acts of the grantors themselves. Upon the trial the plaintiff's title was not disputed, but the defendant made a claim for taxes paid and improvements made upon the premises while holding under said deed from Michael Perrin, under the provisions of sec. 3096, R. S., and offered the deed in evidence, and offered to prove the value of improvements made and the amount of taxes paid by defendant on the premises while holding under said deed. These offers were all rejected, and a verdict directed and rendered for the plaintiff for the recovery of the land, and damages for its detention since the death of Michael Perrin. From judgment on this verdict the defendant appeals.

T. R. Hudd, for the appellant, cited *Barrett v. Stradl*, 73 Wis. 385.

For the respondent there was a brief by *Greene & Vroman*, and oral argument by *C. E. Vroman*. They argued, *inter alia*, that the defendant's grantor, having a life interest only, could not hold the premises adversely as against those entitled to the remainder, nor could his grantee during the continuance of the life estate. *Pinckney v. Burrage*, 31 N. J. Law, 21; *Carpenter v. Denoon*, 29 Ohio St. 379, 398; *Christie v. Gage*, 71 N. Y. 189; *Dupon v. Walden*, 84 Ga. 690; *Taylor v. Kemp*, 86 id. 181; *Austin v. Brown*, 37 W. Va. 634; *Barrett v. Stradl*, 73 Wis. 385. Nor could the

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life tenant, or his grantee, recover for improvements made or taxes paid during the continuance of the life estate. *Barrett v. Stradl*, 73 Wis. 385; *Phelan v. Boylan*, 25 id. 679, 686. When an adverse holding is founded on a written instrument as constituting color of title, such instrument must on its face purport to convey a fee. *Coleman v. Billings*, 89 Ill. 183, 190; *Murphy v. Doyle*, 37 Minn. 113, 116; *Kruse v. Wilson*, 79 Ill. 233, 240; *Bride v. Watt*, 23 id. 507; *Wood v. Conrad*, 2 S. Dak. 334; *Parrish v. Jackson*, 69 Tex. 614; *Wiesner v. Zaun*, 39 Wis. 188; *Furlong v. Garrett*, 44 id. 111, 120; *Cowan v. Lindsay*, 30 id. 586. A purchaser by quitclaim deed cannot be a *bona fide* purchaser, but takes with notice of such outstanding title or interests in other persons in the land as may exist. *Tram Lumber Co. v. Hancock*, 70 Tex. 312; *Johnson v. Williams*, 37 Kan. 179; *O'Neal v. Seixas*, 85 Ala. 80; *Gest v. Packwood*, 34 Fed. Rep. 368; *Oliver v. Piatt*, 3 How. 410; *May v. Le Claire*, 11 Wall. 217; *Villa v. Rodriguez*, 12 id. 323; *Dickerson v. Colgrove*, 100 U. S. 578; *Baker v. Humphrey*, 101 id. 494; Warvelle, Vendors, 615; *Dodge v. Briggs*, 27 Fed. Rep. 167; *Hastings v. Nissen*, 31 id. 597; *Martin v. Morris*, 62 Wis. 418, 428.

WINSLOW, J. The sole question presented is whether, in ejectment, the grantee of a life tenant by quitclaim deed can counterclaim for the value of improvements made and taxes paid by him on the premises while holding under such deed, as against the owner of the fee. The circuit court ruled that he could not, and, we think, correctly so ruled. The statute (R. S. sec. 3096) only allows such claims when made by a party in possession, who has made such expenditures (1) while holding adversely by color of title (2) asserted in good faith, (3) founded on descent or any written instrument. At least one of the above requisites is entirely lacking in the case at bar, and that is the element

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of adverse holding. It is well settled that a grantee in possession under a deed from the life tenant does not hold adversely to the remainder-man during the lifetime of the life tenant. If he hold under a warranty deed purporting to convey the whole estate, he may, under proper proof, be held to hold adversely after the death of the life tenant. *Barrett v. Stradl*, 73 Wis. 385. In the present case, however, the defendant does not hold under a warranty deed, or a deed purporting to convey the whole estate, but only under a quitclaim deed purporting to convey the interest of the life tenant. Such a deed manifestly cannot be made the basis of an adverse holding of the fee in remainder, because it does not purport to convey the remainder. *McEvoy v. Loyd*, 31 Wis. 142; *Cowan v. Lindsay*, 30 Wis. 586. The judgment of the court below was clearly right.

By the Court.— Judgment affirmed.

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See CONTRACTS, 2, 3. DEBTOR AND CREDITOR, 12, 13. FALSE REPRESENTATIONS, 5, 6. INSURANCE, 3, 4. MARRIED WOMEN. RAILROADS, 1.

1. A written option to purchase land does not necessarily supersede a prior oral contract of agency between the same parties for the sale of the same land on commission, whether the option be regarded as an independent contract or merely as a writing to be used by the agent to show his authority to make a sale; and in either case the contract of agency may be shown by parol. *Riemer v. Rice*, 16

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2. An agent to sell land, who was to receive as commission all that was realized on the sale exceeding $35,000, had also an option to purchase the land for $40,000. He produced a *bona fide* purchaser at $40,000, to whom the principal refused to convey, and he was obliged to take title to himself under his option in order to complete the sale. *Held*, that he was entitled to recover his commission. *Ibid.*

3. An agent for the sale of land may abandon his agency, with the knowledge and consent of his principal, and join with others in purchasing the land from such principal. *O'Dell v. Rogers*, 44 Wis. 136, distinguished. *Hawley v. Tesch*, 213

4. An agent for the sale of land, who agrees to pay a broker a commission if he will procure a purchaser, is liable for the commission if the purchaser is procured, though he then discovers that the land is not the property of his principal. *Barthell v. Peter*, 316

5. The minor sons of a farmer, who were running the farm in his absence, agreed to purchase a corn planter on condition that it should do good work. They used it in planting their corn and that of a neighbor, and gave no notice to the vendor that it was unsatisfactory. The father knew, within two days, that the machine was at his farm on trial, but made no attempt to disaffirm the purchase until about a month later, when he had his sons write to the vendor that he would not keep the machine. *Held*, that he could not then deny the authority of his sons to make the purchase as his agents, and that by said use and retention of the machine the right to return it had been waived. *Fintel v. Cook*, 485

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1. An order striking a cause from the calendar because of plaintiff's failure to bring in as a defendant a third person whom the defendant alleged to be primarily liable, is appealable. *Cooper v. Waterloo*, 433

Who may appeal. See VOLUNTARY ASSIGNMENT, 2.

What questions considered: Matters not decided by trial court.

2. A power of attorney offered as a title paper was ruled out as not properly executed, and thereupon all subsequent instruments in the chain of title were ruled out as offered, and a nonsuit was granted. *Held*, that on appeal this court will not pass upon the legal effect of such subsequent instruments as showing plaintiff's title or an estoppel of defendant to deny such title,— that question not having been considered by the trial court. *Slaughter v. Bernards*, 111

Exceptions: Bill of exceptions. See CRIMINAL LAW, 12. TAX TITLES, 10.

3. On appeal from a judgment the supreme court cannot review interlocutory orders which do not involve the merits and necessarily affect the judgment, unless they are excepted to and, with the

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papers on which they are founded, embraced in a bill of exceptions. *Donkle v. Milem,* 33

4. An order opening a judgment by default and allowing the defendant to serve an answer does not involve the merits and necessarily affect a subsequent judgment in favor of the defendant on the pleadings. *Ibid.*

5. Where judgment is rendered in favor of the defendant on the pleadings, no exception is necessary to entitle the plaintiff to a review of the decision on appeal. *Ibid.*

6. On appeal from the judgment in a case tried by a jury, if there is no bill of exceptions containing all the evidence, the only question which can be considered is whether the pleadings support the verdict and judgment. *Baxter v. Berg,* 399

7. Same point. *State v. Duff,* 484

8. An exception to the whole of a sentence in an instruction to the jury is *held* sufficient, although a part of the sentence would have been correct if standing alone, where such part depended upon, and was manifestly intended to be considered in direct connection with, the other part, which was erroneous. *Bleiler v. Moore,* 438

9. A bill of exceptions, properly certified, is conclusive upon this court that an exception contained therein was duly taken. *Ibid.*

Judgment, when ordered.

10. Where an appeal from a justice's judgment for less than $15 was heard in the appellate court on the original papers and the return of the justice, no other bill of exceptions is necessary on appeal to the supreme court; and the latter court may order an affirmative judgment according to the weight of the evidence and the justice of the case. *Fintel v. Cook,* 485

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ASSAULT AND BATTERY.

1. In an action for assault and battery, plaintiff's evidence tended to show that his injuries were very serious, and had rendered him insane, and that he would never recover from the effects thereof, and was insane or partially insane at the time of the trial; but defendant claimed that plaintiff's apparent mental weakness was a sham. After charging the jury that plaintiff was entitled to some damages, and that the only question was as to the amount, the

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court said that the injuries were either very severe and serious, resulting perhaps in making plaintiff a physical and mental wreck, or were very slight and the plaintiff had all the time been shamming and was a huge fraud, and that it was for the jury to determine which of these things was true. *Held*, not improper. *Spear v. Sweeney*, 545

2. It was not error for the court to say, in charging the jury, that it made no difference what particular disease it was with which plaintiff was afflicted after the assault, and "it makes no difference whether it was meningitis cerebral or spinal, or any other disease which has a Latin or Greek name. The question is, What was his condition at that time as a result of the assault?" *Ibid.*

3. The extent to which cross-examination of the plaintiff should be allowed for the purpose of showing that his want of memory and apparent mental weakness was a mere pretense, especially where such cross-examination related to facts collateral to the issue, was a matter resting very much in the sound discretion of the trial court; and the limitation of the cross-examination in this case was not a manifest abuse of such discretion. *Ibid.*

4. It was not error to say, in charging the jury, that they had had an opportunity to observe the physical and mental condition of the plaintiff as far as possible from his appearance and testimony on the stand. *Ibid.*

5. Evidence of threats and abusive language uttered by defendant in reference to plaintiff, fourteen hours after the assault was committed, was admissible to show express malice in the assault. *Ibid.*

6. The damages, assessed at $3,250, are *held* not excessive. *Ibid.*

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ATTACHMENT.

1. An order discharging an attachment will not be reversed on appeal, except upon a clear preponderance of the evidence against the finding of the court below. *Curtis Bros. & Co. v. Hoxie*, 41

2. In November, 1889, defendants made a statement to a commercial agency, showing assets about $250,000 in excess of liabilities, and naming plaintiff and others as references. In May, 1890, they orally stated the same thing to one V., who was collecting information for another agency. These statements greatly underestimated defendants' liabilities, but the evidence tends to show that they were made in good faith and that defendants did not know they were insolvent until they made an assignment in September, 1890. Plaintiff's manager saw the former statement and also talked with V., who told him the substance of the oral statement and that he had learned from other sources that defendants were practically what they represented themselves to be. Plaintiff had had frequent transactions with defendants for several years, and had knowledge of their business methods and the character of their enterprises, which were widely extended and of a somewhat precarious and uncertain nature. Between April 2 and September 1, 1890, plaintiff sold to defendant on credit merchandise to the amount of $30,000, the principal item being $21,000 worth of lumber which, it appears, plaintiff was anxious to sell to them and de-

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fendants were reluctant to purchase. During these transactions the defendants' statements were not mentioned, but plaintiff's manager testified that in extending the credit he relied on the written statement of November, 1889, corroborated by the statement to V. Upon the evidence, showing the above facts among others, it is *held* that there was no clear preponderance of proof that the debt was fraudulently contracted, so as to sustain an attachment. *Ibid.*

3. Under the circumstances, the statement of November, 1889, was too remote to justify the plaintiff in relying upon it absolutely; and the defendants were not responsible for what V. told plaintiff's manager, he having no authority, express or implied, from them to make such statement. *Ibid.*

4. After the death of one of the defendants, the survivor's son, who had no interest in the suit and from whom neither party derived any interest, was competent to give evidence of conversations with the deceased in his lifetime. *Ibid.*

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Before the making of an assignment by an insolvent bank, an agent deposited money of his principal therein in another than his own name, with notice to the bank that it belonged to third parties. The deposit not having been a special one, and it not being claimed that any part of the money which came to the assignee was the identical money deposited, the assets of the bank are not impressed with any trust in favor of the principal so as to make him a preferred creditor. *Henry v. Martin*, 367

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21. *Telford v. Frost*, 76 Wis. 172 (as to preponderance of evidence), distinguished. *Pelitier v. C., St. P., M. & O. R. Co.* 521, 529

22. *Tripp v. School Dist.* 50 Wis. 651. See No. 5.

23. *Vogel v. Antigo*, 81 Wis. 642 (as to presentation of claim based on tort), distinguished. *Van Frachen v. Fort Howard*, 570, 573

CAUSE OF ACTION. See ACTION.

CERTAINTY in pleading. See FALSE REPRESENTATIONS, 2, 3. FLOWAGE OF LAND, 1.

CHANGE OF VENUE.

See CRIMINAL LAW, 4, 5. MILWAUKEE MUNICIPAL COURT. TRIAL BY JURY, 2.

The circuit court upon its own motion can change the venue of an action only in the cases mentioned in sec. 2623, R. S.; and the facts must appear from the record. *Mills v. National F. Ins. Co.* 351

CHARGING THE JURY. See INSTRUCTIONS TO JURY.

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CHECKS. See NEGOTIABLE INSTRUMENTS, 6–8. VENDOR AND PURCHASER, 5.

CHILD as a witness. See CRIMINAL LAW, 19, 32, 33. EVIDENCE, 5.

CIRCUIT COURT: Jurisdiction. See CRIMINAL LAW, 14. JUSTICES' COURTS, 1. PARTITION. WILLS, 2.

CIRCUMSTANTIAL EVIDENCE. See CRIMINAL LAW, 36.

CITIES. See MUNICIPAL CORPORATIONS.

CITY ATTORNEY of Milwaukee. See MUNICIPAL CORPORATIONS, 1–4.

CLAIMS against cities: Presentation. See MUNICIPAL CORPORATIONS, 17, 18.

CLERICAL ERROR in finding. See TAX TITLES, 10.

CLERK of circuit court: Filing papers. See LIENS, 2.

CLOUD UPON TITLE. See EJECTMENT, 1. TAX TITLES, 11.

CO-EMPLOYEES. See MASTER AND SERVANT, 7, 8.

COMMISSIONERS OF PUBLIC LANDS. See PUBLIC LANDS.

COMMISSIONS of real-estate brokers. See AGENCY, 1, 2, 4.

COMMON CARRIERS. See RAILROADS, 1.

COMPLAINT. See CRIMINAL LAW, 23. DAMAGES, 2. FALSE REPRESENTATIONS, 2, 3. FLOWAGE OF LAND. LIBEL. MALICIOUS PROSECUTION. MUNICIPAL CORPORATIONS, 18. PHYSICIANS AND SURGEONS, 3. SALE OF CHATTELS, 5.

CONDITION precedent to action. See INSURANCE, 1. LIENS, 2. MUNICIPAL CORPORATIONS, 9, 14, 17, 18.

CONFESSIONS. See CRIMINAL LAW, 21, 22.

CONFLICT OF LAWS. See EVIDENCE, 3, 4.

CONSTITUTIONAL LAW. See CRIMINAL LAW, 15. MUNICIPAL CORPORATIONS, 1–8. PUBLIC LANDS, 1–3.

CONTRACTS.

See AGENCY. ATTACHMENT, 2, 3. BANKS AND BANKING. DEBTOR AND CREDITOR. FALSE REPRESENTATIONS. FRAUD. INSURANCE. LIENS. MARRIED WOMEN. MUNICIPAL CORPORATIONS, 20–24. NEGOTIABLE INSTRUMENTS. NORMAL SCHOOLS, 2, 3. PARTNERSHIP. PHYSICIANS AND SURGEONS, 4. SALE OF CHATTELS. TRADE-MARKS, 2. VENDOR AND PURCHASER.

1. Plaintiff commenced an action against her husband for services as cook in a lumber camp, and in the complaint, and also in the affidavit for attachment and the verified claim for a lien on railroad ties cut by the men for whom she cooked, stated that she did the work for her husband and that he promised to pay her therefor. She also testified to the same effect on the trial. On an appeal to the circuit court the complaint was amended so as to allege that she did the work for the owner of the ties, a corporation with which the husband had a contract to get out such ties. The amended complaint also alleged that all the statements in the claim for a lien were true. Upon the trial in the circuit court the testimony of the plaintiff and her husband showed that she was to be paid out of the money coming to him on his contract. *Held*, that a verdict finding that the plaintiff did the work as an employee of the corporation and under a contract with it was not supported by the evidence. *Morrissy v. Coolidge F. & S. Co.* 275

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2. Plaintiff and defendants agreed to purchase certain land, he taking a half interest and they the other half. Defendants paid the earnest money and took a receipt from the vendor, specifying when subsequent payments should be made and providing that in case of default in any payment said earnest money should be forfeited, time being of the essence of the contract. Plaintiff afterwards paid to defendants, who were agents of the vendor, a sum to balance the earnest money paid by them, and also his half of the next payment, and the same was applied by them accordingly. Plaintiff thereafter failed and refused to make further payments, and defendants completed the purchase and sold the land again at a loss. *Held*, that plaintiff could not recover from them the amount paid by him, as money had and received to his use. *Blewett v. McRae*, 280

3. Defendants' concealment of the fact that they were to receive a commission on the sale did not entitle plaintiff to recover the amount paid by him, no fraud having been practiced on him, and it appearing that they were to take an interest in the land only in case plaintiff's original associate failed to do so. *Grant v. Hardy*, 33 Wis. 668, distinguished. *Ibid.*

4. One who contracted to furnish all the granite required for a building, according to the plans and specifications, for a specified sum, cannot recover upon *quantum meruit* if he fails to perform such contract. *Cohn v. Plumer*, 622

5. Where a complete contract was made orally, the fact that it was expected that a written contract would afterwards be signed, embodying the terms of the oral contract, does not prevent the oral contract from taking effect. *Ibid.*

CONTRIBUTORY NEGLIGENCE. See MASTER AND SERVANT, 1, 9. MUNICIPAL CORPORATIONS, 15. NEGLIGENCE, 7. RAILROADS, 2, 3, 6. STREET RAILWAYS, 3, 4.

CONVEYANCES. See DEBTOR AND CREDITOR. EJECTMENT, 2. EVIDENCE, 4. FRAUD. PARTNERSHIP. POWER OF ATTORNEY. VENDOR AND PURCHASER.

CORPORATIONS.

See FALSE REPRESENTATIONS, 5, 6. MUNICIPAL CORPORATIONS, 20–24.

1. A corporation whose primary object is without statutory authority can have no legal existence, even though among of its declared purposes are some for the promotion of which the law permits corporations to be formed. *State ex rel. Lederer v. Inter-National Investment Co.* 512

2. Thus, a corporation whose primary object is to obtain money from its members is *held* to be unauthorized, although its purposes, as declared in its articles of incorporation, are "to encourage frugality and economy in its members; to create, husband, and distribute funds from monthly instalments, dues, or investments from its members; to purchase, take, hold, sell, convey, lease, rent, and mortgage real estate and personal property; to loan surplus accumulations; and to carry on and conduct a general investment business." *Ibid.*

3. Sec. 1771, R. S., authorizes the formation of corporations for certain designated purposes, "or for any lawful business or purpose whatever, except," etc. *Held*, that these general words extend only to things of a nature kindred to those specifically mentioned. *Ibid.*

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[4. Whether a mere *resident* of the state can, under sec. 3241, R. S., maintain an action to annul the existence of a corporation, not determined.] *Ibid.*

COSTS.

Respondent's brief of 147 pages being unjustifiably long, he is allowed therefor, in the taxation of costs, the expense of printing forty pages only. *Jackson v. Wis. Telephone Co.* 243

COUNSEL for state: Waiver of objection to. See CRIMINAL LAW, 6.

COUNTERCLAIM. See EJECTMENT. PHYSICIANS AND SURGEONS, 2.

COUNTIES.

1. Under sec. 655, S. & B. Ann. Stats., two petitions, having the signatures of different qualified signers, for the submission to the electors of the question of the removal of a county seat, should be considered and acted upon by the county board as one petition, although the second was presented while the first was under consideration. *State ex rel. Hawley v. County Board,* 355

2. Until proper final action by the county board on such a petition, signers thereof may withdraw their names; and where an alternative writ of *mandamus* has been issued to compel the county board to consider and act upon the petition, the return thereto may show the withdrawal of names, even after service of the writ. *Ibid.*

3. Where the signatures to the petition vary from the names on the poll list,—as where initials only are used in one while the full given names appear on the other, or a middle initial used in one does not appear in the other, etc.,—the board should receive evidence, by affidavit or otherwise, to show that the petitioners are the same persons whose names are on the poll lists. *Ibid.*

4. *Mandamus* will lie to compel the county board in such a case to receive evidence as to the identity of the petitioners with the electors whose names are on the poll lists, and also to compel the board to consider and act upon a second petition with additional signatures, presented while the first was under consideration. *Ibid.*

COUNTY COURT. See WILLS, 2, 3.

COUNTY ROADS. See HIGHWAYS, 4.

COUNTY SEAT: Removal. See COUNTIES.

COUNTY TREASURER. See LIBEL. TAX TITLES, 11.

COURT AND JURY. See DEBTOR AND CREDITOR, 1. HIGHWAYS, 2. INSTRUCTIONS TO JURY. MASTER AND SERVANT, 1, 10. NEGLIGENCE, 4. NEGOTIABLE INSTRUMENTS, 5.

COURTS. See CRIMINAL LAW, 14. JUSTICES' COURTS. MILWAUKEE MUNICIPAL COURT. WILLS, 2, 3.

CREDITOR'S remedies. See DEBTOR AND CREDITOR.

CRIMINAL LAW AND PRACTICE.

See MILWAUKEE MUNICIPAL COURT. PROHIBITION. TAXATION.

1. The burning of a dwelling house, under sec. 4399 or sec. 4400, R. S., and the burning of a building, under sec. 4402, are separate and distinct offenses, neither including the other; and upon an information charging the burning of a building there can be no conviction if it was a dwelling house that was burned. *State v. Atkinson,* 1

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2. The fact that the defendant in a criminal case was brought into the state forcibly and without extradition papers does not deprive the trial court of jurisdiction. *Baker v. State,* 140

3. After having pleaded to the merits and been once tried and convicted, the defendant was allowed to file a plea in abatement, which, however, was overruled and he was again tried on the merits and convicted. *Held,* that he could not raise the objection for the first time in the appellate court that his plea to the merits was withdrawn by the filing of the plea in abatement and that he had never afterwards pleaded to the merits. *Ibid.*

4. After having obtained a change of venue on the ground of prejudice of the judge, the defendant cannot upon a new trial have another change on the same ground. R. S. sec. 4680. *Ibid.*

5. The fact that after the first trial the judge wrote to the attorney general expressing anxiety as to the correctness of the bill of exceptions and suggesting the aid of certain counsel, did not disqualify him from presiding at the second trial. *Ibid.*

6. Objections to the assistant counsel on the part of the state were waived by the defendant when, having been called upon in open court to make any such objection, he failed to do so. *Ibid.*

7. A juror stated, on his examination, that from what he had read in the newspapers and heard said about the case he had formed an opinion which it would take evidence to remove; that he was afraid he could not give the testimony the same weight and decide the case the same as though he had no opinion; that he had no prejudice for or against the accused; that he thought he could and would lay aside what he had heard and read, and try the case according to the evidence given in court, and upon that alone; that the opinion he had formed would have no weight as against the testimony which should be submitted in court; and that he felt confident that nothing he had heard or read would bias him in returning a just verdict the same as though he had never heard about the case. There being no other evidence, this court holds that it cannot say, as a matter of fact, that the finding of the trial court to the effect that the juror was indifferent as between the parties was contrary to the evidence, nor, as a matter of law, that the court abused its discretion in permitting him to serve as a juror. *Ibid.*

8. Under sec. 4703, R. S., the trial court properly allowed an information for larceny to be amended so as to conform to the proof as to the ownership and amount of the money stolen, the difference in amount being insignificant as bearing on the grade of the offense. *Ibid.*

9. The plea of not guilty entered prior to such amendment stood as the plea to the amended information. *Ibid.*

10. Where an information for larceny contained two counts which were the same except as to the ownership of the money stolen, it was a matter within the discretion of the trial court whether the prosecution should be required to elect between them. *Ibid.*

11. Upon a trial for larceny a direction that the jury be kept together, and a modification thereof allowing the jurors to attend their places of business with the permission of the court, were within the discretion of the court. *Ibid.*

12. Upon a trial for larceny, money taken from the defendant when he was arrested was admitted in evidence. Defendant's counsel hav-

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ing moved to strike it out because it did not appear that it was part of the money stolen, the trial court said "I think the evidence introduced upon the part of the state shows to us that it is a portion of the money taken at that time; consequently the motion is denied." A general exception by defendant is construed as applicable only to such denial of the motion, and not to the fact that the court expressed an opinion upon that branch of the evidence; and the remark itself is *held* to have been manifestly intended merely as a statement that the evidence tended to prove that it was a part of the money taken. *Ibid.*

13. Where, upon a second trial, the defendant is a second time convicted and sentenced, and is confined by virtue of the judgment, this court cannot, on a writ of *habeas corpus*, inquire into, and deduct from the second sentence, time served under the first or any diminution to which he may be entitled on account of good behavior, under ch. 238, Laws of 1880. *Ibid.*

14. Sec. 2, ch. 318, Laws of 1887, provides that the several county and municipal courts shall have concurrent jurisdiction with the circuit courts of the offense of neglecting to provide for a wife and minor children. Sec. 4 provides that if the accused is bound over for trial the record shall be transmitted to the county or municipal court, and the accused be ordered to appear before such court for trial. *Held*, that the two sections were not in conflict, and that sec. 4 did not prohibit the circuit court from exercising jurisdiction over the offense. The latter section is to be construed as directing that the record be transmitted to the county, municipal, *or circuit* court. *State v. Grunke*, 159

15. An act is not unconstitutional because it makes an offense a misdemeanor but provides an alternative punishment as for a felony; and the grade of the offense, in such case, is a question for construction. *Ibid.*

16. The question being whether a duck was shot in the night time in violation of sec. 14, ch. 106, Laws of 1898, an instruction fixing the end of night and the commencement of day at exactly one hour before sunrise was erroneous. If there was daylight enough to discern a man's face it was day time; otherwise not. *Klieforth v. State*, 163

17. The record in a murder case, which through the neglect of the clerk fails to show that defendant was present at every stage of the trial, conviction, and sentence, may be amended by entries *nunc pro tunc* showing that fact, upon the testimony of the clerk and sheriff, at a subsequent term and after defendant has sued out a writ of error,—he being present and heard on the motion to amend. *Hoffman v. State*, 166

18. Under sec. 4345, R. S., defining murder in the third degree as a killing, without any design to effect death, by a person engaged in the commission of any felony, and sec. 4377, making an assault with intent to do great bodily harm a felony, one cannot be convicted of murder in the third degree on the ground that he was engaged in an assault with intent to do great bodily harm upon a person other than the deceased, where the evidence shows that such assault was at an end before the killing occurred. *Ibid.*

19. A conviction of the offense of open and gross lewdness may be sustained upon the testimony (with some corroboration) of a child five years and five months old, who was less than five years old when the offense was committed. *State v. Juneau*, 189

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20. An act of gross lewdness is "open," within the meaning of sec. 4579, R. S., though committed in a private place and when no one was present but the defendant and the person upon whom the act is alleged to have been committed, and although such person was a child of tender years. *Ibid.*

21. An error in admitting a confession, incompetent because made under duress, is not cured by the subsequent exclusion thereof. The admissibility of the confession should have been determined before it was admitted. *Shephard v. State,* 185

22. The confession having been admitted and afterwards excluded as incompetent, it was error to allow the defendant, who had testified on his own behalf, to be asked on cross-examination whether he made such confession, and, upon his denial, to admit evidence that he did make it, and of the particulars thereof, for the purpose of contradicting him. *Ibid.*

23. A criminal complaint subscribed and sworn to before a magistrate and purporting to have been made after the complainant had been duly sworn, will be regarded as a sufficient examination of the complainant on oath, under sec. 4776, R. S. *State ex rel. De Puy v. Evans,* 255

24. Under sec. 4809, R. S. (providing that if a person brought before a magistrate for examination shall make oath of prejudice the magistrate "shall transmit all the papers in the case to the nearest justice or other magistrate, qualified by law to conduct the examination"), the question whether the nearest justice or other magistrate is so qualified must be summarily determined by the magistrate before whom the oath of prejudice is made, and his determination is conclusive. *Ibid.*

25. A warrant for the arrest of a person accused of a crime is insufficient if it fails to state any town, village, city, or county in which the alleged offense was committed or the proceedings instituted. A reference to "said county" is unavailing if no county is mentioned. *Ibid.*

26. Under sec. 4541, R. S. (providing that any officer of any bank "who shall accept or receive on deposit, or for safe-keeping, or to loan, from any person, any money . . . when he knows, or has good reason to know, that such bank . . . is unsafe or insolvent, shall be punished," etc.), where an information charges that the defendant accepted and received money "on deposit *and* for safe-keeping," it must be proved, in order to sustain a conviction, that the money was received for safe-keeping, or as a special deposit, and proof of a general deposit is insufficient. CASSODAY and NEWMAN, JJ., dissent. *Koetting v. State,* 502

27. A motion in arrest of judgment can be founded only on defects which appear on the face of the record, and not upon errors occurring on the trial which can be made apparent only by a bill of exceptions. *Barnard v. State,* 656

28. An information for the offense described in sec. 4382, R. S. (providing that "any person who shall unlawfully and carnally know and abuse any female under the age of twelve years, shall be punished," etc.), need not charge that the act was done unlawfully, it being a crime at common law and manifestly illegal. *Ibid.*

29. The word "feloniously" in an information for such an offense is fairly equivalent to the word "unlawfully." *Ibid.*

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30. Where the verdict in a criminal case is received in regular session, it is not necessary that the defendant's attorney be notified so that he may be present. *Ibid.*

31. Where the evidence was clear and undisputed that the crime in question had been committed by some one, it was not error for the court to say to the jury that the evidence showed that fact and it was conceded by defendant's counsel. If counsel did not in fact concede it, he should at once have called the attention of the court to the mistake. *Ibid.*

32. On a trial for an assault upon a girl seven years old, it is *held* not to have been an abuse of discretion to permit her to testify as a witness, she appearing to have had the degree of intelligence that is usually possessed by girls of that age. *Ibid.*

33. It was not error in such case to charge the jury: "You will not take and consider her statements, if they are contradictory and inconsistent, as you would those of a mature person; but you must take them as the statements of this little girl, given under the circumstances as you have seen, and must weigh them in connection with all the other testimony in the case." *Ibid.*

34. After the jury had been instructed that defendant should be acquitted unless the testimony convinced them beyond a reasonable doubt of the existence of all the facts necessary to show him guilty of the offense charged, or of the offense of which they found him guilty, it was not error to charge them further that if they were not satisfied beyond a reasonable doubt that he was guilty of rape, but were "satisfied from the testimony" that he assaulted the girl with the intent of committing a rape upon her, it was their duty to acquit him of the greater offense and find him guilty of an assault with intent to commit rape. *Ibid.*

35. Where the trial judge has held the testimony sufficient to sustain a verdict of guilty, and it is not made to appear in this court that it was insufficient, the judgment will not be disturbed. *Ibid.*

36. When circumstantial evidence is relied upon for conviction in a criminal case, each of the several circumstances upon which the conclusion of guilt necessarily depends must be proven beyond a reasonable doubt, and they must not only point with moral certainty to the guilt of the defendant, but must exclude, to a moral certainty, every other reasonable hypothesis; and instructions embodying these principles should be given if requested. *Kollock v. State*, 663

37. An admission of his own guilt by one of two defendants is not evidence against the other. *Ibid.*

38. On a trial for feloniously burning a barn, admissions by defendant that he had previously burned the owner's hay and poisoned his horses bear upon the question of malice only, and do not tend to prove the commission of the crime charged. *Ibid.*

CROSS-EXAMINATION. See CRIMINAL LAW, 22.

CUSTOM. See MASTER AND SERVANT, 8. PUBLICATION OF LEGAL NOTICES, 3.

DAMAGES.

See ASSAULT AND BATTERY. DEBTOR AND CREDITOR, 9. FALSE REPRESENTATIONS, 1, 4. INSTRUCTIONS TO JURY, 2. SALE OF CHATTELS, 3-5.

1. In an action for an injury which permanently deprived plaintiff of the use of an arm, evidence on his behalf that he had no education or trade was admissible upon the question of damages. *McCoy v. Milwaukee St. R. Co.* 56

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2. Damages for mental suffering caused by serious personal injury are not special damages, and need not be specially pleaded or proved. *Ibid.*

3. An award of $4,000 for a permanent, and almost or quite total, loss of the use of his left arm by a boy seventeen years old, is *held* not excessive. *Ibid.*

4. An error in allowing the jury to find punitory damages is cured where the compensatory and punitory damages are assessed separately and the latter are afterwards disallowed by the court. *Stone v. C., St. P., M. & O. R. Co.* 98

5. In an action for the death of an unmarried man, to recover damages for the benefit of his parents, evidence that he had said that he did not intend to marry and that he would take care of his father and mother, was properly admitted. *Bright v. Barnett & R. Co.* 299

6. An award of $4,000 in such a case is *held* not excessive, the jury having assessed the damages at $5,000, and the trial court having required the plaintiff to remit all in excess of $4,000. *Ibid.*

DAMS. See FLOWAGE OF LAND.

DEATH caused by negligence, etc. See DAMAGES, 5, 6. NEGLIGENCE, 6–8. RAILROADS, 6.

DEBTOR AND CREDITOR.

See ATTACHMENT. BANKS AND BANKING. CONTRACTS, 1, 4. EXECUTIONS. INTEREST. LIENS. NEGOTIABLE INSTRUMENTS. PHYSICIANS AND SURGEONS, 4. REPLEVIN, 3. VOLUNTARY ASSIGNMENT.

1. The question of fraudulent intent in a debtor's conveyance of his property being made, by sec. 2323, R. S., a question of fact for the jury, the judgment in such a case should not be reversed on the ground that the verdict is against the evidence, unless it is so clearly and palpably against the evidence that the refusal of the trial court to set it aside was an abuse of discretion. *Kaufer v. Walsh,* 63

2. Evidence that the persons to whom a debtor had transferred his property with attempted secrecy had engaged in other fraudulent transactions with other persons, or that it was their common course of business to receive consignments in the same way from insolvent merchants, was not admissible to show their participation in the debtor's intent to defraud his creditors. *Ibid.*

3. In replevin by the persons to whom the debtor transferred the goods, against the sheriff who had seized the goods on writs of attachment as the property of the debtor, and who justified on the ground that the transfer was fraudulent, it was error to instruct the jury that the sheriff was only a nominal party and that the real defendant was the attaching creditor, a resident of another state. *Ibid.*

4. An instruction in such case that the burden was upon the defendant to prove that the transfer was made with the *design* and *intent* upon the part of the debtor to hinder, delay, *and* defraud his creditors, and that plaintiffs' *participated* in, as well as knew of, the fraud, and had *aided and assisted* the debtor in his design and attempt, was also erroneous. *Ibid.*

5. It being a material question for the jury whether the plaintiffs obtained the goods in the regular course of their business, it was error for the court to say to the jury in relation thereto: "If plaintiffs have succeeded in proving these facts (about which I understand there is substantially no dispute)," etc. *Ibid.*

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6. It was error, also, to instruct the jury that it was incumbent upon the defendant to prove to their *satisfaction* and *convince* them by a *fair preponderance* of the evidence that the transfer was made with intent to hinder, delay, or defraud creditors. *Ibid.*

7. An instruction that the party alleging fraud must prove it, that it is not to be presumed *however suspicious the facts and circumstances may be*, and that in cases of this nature *facts* must be shown in order to establish the defense, was erroneous as giving the jury to understand that positive evidence was necessary to prove fraud, in contradistinction from suspicious facts and circumstances. *Ibid.*

8. The plaintiffs having made advances to the debtor upon the goods consigned to them, it was error to instruct the jury that, to defeat a recovery, it must be proved that the plaintiffs knew or had reason to know, at the time of making such advances, that the debtor did not intend to use such advances in the payment of his indebtedness or for the legitimate requirements of his business, or that he intended to use or dispose of such advances in such a way as to hinder, delay, or defraud his creditors. *Ibid.*

9. The goods having been consigned to the plaintiffs to be sold on commission, and they having only a special property therein to the extent of the advances made, being about $7,600, a verdict that they were entitled to the possession of the property, of the value of $10,000, and six cents damages, was erroneous. *Ibid.*

10. Relationship of the parties to a transfer of property alleged to be fraudulent as to creditors is not a badge of fraud, but is simply a circumstance which, when shown, calls for closer scrutiny and clearer explanation of the transaction. *Bleiler v. Moore*, 438

11. An insolvent debtor has a right, as against his creditors, to give to his son his exempt property and also his time in carrying on and managing his son's business. *Ansorge v. Barth*, 553

12. But an insolvent debtor cannot accumulate property under cover of another's name, acting ostensibly as the agent of such other, and hold it as against his creditors; and where such a claim is made, it is always a question of fact whether the business actually belongs to such other person, or to the ostensible agent and debtor, and whether the alleged agency was a mere scheme and device to conceal and keep the property used in or gained by it from his creditors. *Ibid.*

13. Land purchased in the name of the wife of an insolvent debtor was paid for out of the proceeds of a business carried on by him in the name of his son. In an action to subject such land to the payment of his debts, the evidence — showing, among other things, that the wife had no separate estate, and that the son had contributed nothing to the business but the use of his name, and had paid no attention to the purchase of the land, which was managed by his father; and not showing that the son had ever received any of the proceeds of the business, or that there had ever been an accounting between him and his father in reference thereto — is *held* to sustain findings of the trial court to the effect that the debtor was the real owner of the business, and carried it on in the son's name for the purpose of fraudulently concealing it and its profits from his creditors; that the land was purchased with such profits and conveyed to the wife and accepted by her with the same fraudulent intent; and that it should be conveyed by her to her husband's assignee for the benefit of creditors. *Mayers v. Kaiser*, 85 Wis. 382, distinguished. *Ibid.*

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DECEIT. See CONTRACTS, 3. FALSE REPRESENTATIONS. VENDOR AND PURCHASER, 1–3, 10.

DEEDS. See EJECTMENT, 2. EVIDENCE, 4. POWER OF ATTORNEY. TAX TITLES.

DEFAULT. See APPEAL, 4. JUDGMENT.

DEFINITIONS. See WORDS AND PHRASES.

DELAY. See ESTATES OF DECEDENTS, 2. TAX TITLES, 6.

DELIVERY. See VENDOR AND PURCHASER, 7.

DEMAND. See VENDOR AND PURCHASER, 7.

DEMURRER. See JUDGMENT. MALICIOUS PROSECUTION.

DEPOSITS in banks. See BANKS AND BANKING. CRIMINAL LAW, 26.

DESCENT AND DISTRIBUTION. See ESTATES OF DECEDENTS. WILLS.

DESCRIPTION of land. See TAX TITLES, 7. VENDOR AND PURCHASER, 6.

DIMINUTION of term of imprisonment. See CRIMINAL LAW, 13.

DISCONTINUANCE of action. See EJECTMENT, 1. JUSTICES' COURTS, 1.

DISCRETION. See CRIMINAL LAW, 11. EVIDENCE, 5. TRIAL BY JURY, 1.

DISSOLUTION of corporation. See CORPORATIONS, 4.

DIVORCE. See ESTATES OF DECEDENTS, 1, 2.

DOCKETING judgment. See EXECUTIONS, 2, 3.

DURESS. See CRIMINAL LAW, 21. NEGOTIABLE INSTRUMENTS, 2, 3, 5.

EASEMENTS. See RIGHT OF WAY.

EJECTION of person from train. See RAILROADS, 1.

EJECTMENT.

1. In ejectment, facts which constitute a complete legal defense are not the proper subject of a counterclaim. Thus, defendants claiming under tax deeds cannot allege as a counterclaim that redemption receipts upon which plaintiff relies to defeat such deeds are forged and fraudulent, and have such receipts set aside or canceled as a cloud upon the title. The ejectment action would be followed by a judgment conclusive as to the title, and if plaintiff should discontinue defendants might at once bring an action to protect their title; or, if there is danger of the loss of testimony of material witnesses, they may proceed to perpetuate such testimony under the statute. *Brown v. Cohn*, 627

2. In ejectment the grantee of a life tenant by quitclaim deed cannot counterclaim for the value of improvements made and taxes paid by him while holding under such deed, as against the owner of the fee. Such a deed cannot be made the basis of an adverse holding of the fee in remainder. *Falck v. Marsh*, 680

ELECTION between counts. See CRIMINAL LAW, 10.

ELECTION not to take under will. See ESTATES OF DECEDENTS, 6, 7.

ELECTIONS. See MUNICIPAL CORPORATIONS, 1–4. PUBLICATION OF LEGAL NOTICES, 2, 3.

ENCROACHMENTS on highways. See TOWNS.

ENTIRE CONTRACT. See CONTRACTS, 4.

EQUITY. See BANKS AND BANKING. DEBTOR AND CREDITOR. EJECTMENT, 1. FRAUD. INJUNCTION. INTEREST. LIENS. PARTITION. TAX TITLES, 11. TRADE-MARKS, 3. VENDOR AND PURCHASER, 1–3, 8–10. WILLS, 2.

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ESTATES OF DECEDENTS.

See VENDOR AND PURCHASER, 3, 10. WILLS.

1. In a proceeding to set aside the final settlement of the estate of a decedent on the ground that the person to whom, as his widow, the estate had been assigned had never been his lawful wife and had fraudulently procured such assignment, it is *held*, upon the evidence, that there had been no concealment or misrepresentation by her of the facts relating to her prior marriage; and, it appearing that before she married the deceased she had obtained a judgment of divorce from her prior husband in a court of competent jurisdiction, which judgment was fair on its face and was believed by her to be valid, it was not fraud for her, relying on such divorce, to state that she was the lawful wife of the deceased, even though such divorce was in fact invalid. *Thomas v. Thomas*, 88

2. The petitioners, the heirs at law of the deceased, knew or had heard rumors of the former marriage of the widow, but took no steps to prevent the assignment of the estate to her, and apparently made no inquiries until more than five years later and after her death. The testimony tending to show that they obtained any knowledge of the facts after her death was very slight. *Held*, that if ignorant of the facts at the time of the settlement of the estate, they were negligently ignorant, and that they had been guilty of laches which would preclude their obtaining the relief sought. *Ibid.*

3. Property of a testator was found in four states and was looked after with diligence by the executor, who also investigated a claim that there was property in another state to which the will made no reference. The will was complicated in its provisions and difficult in execution, and suits for its construction were persistently fought in three states. Nearly all the steps taken by the executor were criticised and questioned, and the estate was in constant litigation during the entire term of his service. *Held*, that the case was one of "unusual difficulty," and extra compensation was properly allowed the executor under sec. 3929, R. S. *Ford v. Ford*, 122

4. Though neither the statute nor the rule (County Court Rules of 1879, XVII, sec. 6) requires it, it is better practice to itemize the executor's claim for extra compensation; but a claim allowed by the county court should not be rejected on appeal merely because it was not itemized, where there was no motion that it be itemized or a bill of particulars furnished, and it was in fact itemized on the trial. *Ibid.*

5. Under sec. 3929, R. S., providing for allowance, as extra compensation in certain cases, of such sums "as the county court shall judge reasonable," that court may, in its discretion, allow a sum smaller than that fixed by the uncontradicted evidence as to the value of the services. *Ibid.*

6. The "net personal estate" of a testator, not less than one third of which is, under sec. 2172, R. S., to go to the widow if she elects not to take under the will, is the personal estate left after payment of the debts, allowances, and charges and all expenses of administration, including those made necessary by the will. *Ibid.*

7. The disposition to be made of property given by a will to the testator's widow, who elected to take the provision made for her by law, having been involved and expressly determined in a prior proceeding, and the entire judgment therein having been affirmed on appeal, that matter is *res adjudicata*, although that part of the judgment was not questioned on said appeal. *Ibid.*

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8. Where it had been impossible for the executor, though using all reasonable diligence, to complete the administration within the six years allowed by sec. 3850, R. S., it was proper to refuse to remove him and appoint an administrator *de bonis non.* *Ibid.*

9. An infant, who had no property except his prospective interest in the estate, being a necessary party to litigation involving the estate, no part of which was commenced by him or on his behalf, the expenses incurred by his guardian *ad litem* for attorneys' fees and disbursements in such litigation were rightly allowed as part of the expenses of administration; but the expenses incurred by the testator's widow in such litigation, much of which she herself commenced, were properly disallowed. *Ibid.*

ESTOPPEL. See AGENCY, 5. APPEAL, 2. NEGOTIABLE INSTRUMENTS, 1.

EVIDENCE.

See AGENCY, 1. APPEAL, 2. ASSAULT AND BATTERY, 3, 5. ATTACHMENT, 4. CRIMINAL LAW, 18, 19, 21, 22. DAMAGES, 1, 2, 5. DEBTOR AND CREDITOR, 2, 4, 7, 10. FALSE REPRESENTATIONS, 6. FRAUD, 1, 2. HIGHWAYS, 1. MASTER AND SERVANT, 8. PHYSICIANS AND SURGEONS, 1. STREET RAILWAYS, 1, 2. VENDOR AND PURCHASER, 8.

1. Where the laws of another state have not been offered in evidence they cannot be considered by the court; and references to them in the argument of counsel do not amount to an offer and admission of them in evidence. *Slaughter v. Bernards,* . 111

2. A power of attorney offered in connection with other title papers was presumably offered as a title paper and not to show an estoppel. *Ibid.*

3. Under sec. 96, ch. 98, R. S. 1849 (sec. 4159, R. S. 1878), a power of attorney theretofore recorded, relating to lands in this state, and purporting to have been acknowledged before a notary public in another state, and having his certificate in the ordinary form, is *prima facie* good and sufficient, and it or the record thereof is admissible in evidence, in the absence of proof of the laws of such other state. *Ibid.*

4. In the absence of proof as to the laws of another state they will be presumed to be the same as our own, under which a notary public may take the acknowledgment of a deed. *Ibid.*

5. Whether a child above the age of four years is competent to testify is to be determined by examination of the child in court, and the question is addressed to the discretion of the trial court. *State v. Juneau,* 180

EXAMINATION of offenders. See CRIMINAL LAW, 23, 24. PROHIBITION.

EXCEPTIONS. See APPEAL, 3-10. CRIMINAL LAW, 12.

EXCESSIVE damages. See ASSAULT AND BATTERY, 6. DAMAGES, 3, 6.

EXECUTIONS.

See REPLEVIN, 3.

1. Where an execution was levied on property in the hands of a third person, who claimed title thereto under a transfer from the judgment debtor, the officer and creditor attempting to justify under the writ on the ground that such transfer was fraudulent must show that they acted under a valid judgment and execution. *Bugbee v. Lombard,* 271

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2. An execution cannot be issued to a county other than that in which the judgment was rendered, until the judgment has been docketed in such other county. *Ibid.*

3. The existence of the judgment in the county of its rendition and the issuance of an execution to another county afford no presumption that the judgment had been docketed in the latter county. *Ibid.*

EXECUTORS AND ADMINISTRATORS. See ESTATES OF DECEDENTS. WILLS.

EXEMPTIONS. See DEBTOR AND CREDITOR, 11. VOLUNTARY ASSIGNMENT.

EXPERT TESTIMONY. See NEGLIGENCE, 4. PHYSICIANS AND SURGEONS, 1. STREET RAILWAYS, 1.

EXTENSION of time for payment. See NEGOTIABLE INSTRUMENTS, 1.

EXTRA COMPENSATION of executor. See ESTATES OF DECEDENTS, 3–5.

EXTRADITION. See CRIMINAL LAW, 2.

FALSE property statement. See TAXATION.

FALSE REPRESENTATIONS.

See SALE OF CHATTELS, 2. VENDOR AND PURCHASER, 1–3, 10.

1. Defendant induced plaintiff to join with him in the purchase of certain land, each to pay one half of the purchase price, which defendant falsely represented to be $8,000, when in fact it was but $3,000. Plaintiff gave defendant $4,000 to be used in paying for his share, and defendant paid for the land with $3,000 thereof, and kept the remaining $1,000 himself. *Held*, that even though the land was worth $8,000 the deceit was actionable and plaintiff was entitled to recover the amount paid to defendant in excess of his share of the actual price. *Bergeron v. Miles*, 397

2. A complaint alleging the making of a contract by which plaintiff agreed to drive certain logs for defendant for $1,000: that plaintiff was induced to so agree by defendant's false and fraudulent statement, upon which he relied, that the number of the logs did not exceed 3,700; that the actual number thereof exceeded 11,000, and the expense of driving them was thereby greatly increased; that plaintiff drove all of the logs to the place agreed upon; and that a fair and reasonable compensation therefor was $4,000, for which amount judgment is demanded, with interest and costs,— is *held* to state a cause of action for damages for the deceit, and not upon contract, although it demands a judgment proper only in an action on contract. *Sell v. Mississippi River Logging Co.* 581

3. If the defendant was in doubt as to the nature of the action, it should have moved to have the complaint made more definite and certain. *Ibid.*

4. It appearing that the plaintiff did not discover, and could not by using due diligence have discovered, the falsity of the representation until the logs were in the river with others in its care, and the drive was in progress, and it was impracticable to abandon them, the completion of the drive was not an affirmance of the contract or a waiver of his right to recover damages for the fraud, measured by what the work was reasonably worth. *Ibid.*

5. The question being whether an agent of a corporation induced the making of a contract with it by false representations, evidence of what took place at and before the execution of the contract was admissible to show such false representations. *Ibid.*

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6. The authority of a person to make a certain contract for a corporation being in issue, a question whether he had received any instruction from the company or any of its officers, agents, or servants to make the contract, was objectionable as being too general in form and as calling for conclusions, and its exclusion was not error where he was allowed to state how he came to make the contract. *Ibid.*

FELLOW-SERVANTS. See MASTER AND SERVANT, 7, 8.

FELONY or misdemeanor? See CRIMINAL LAW, 15.

FENCES. See TOWNS.

FILING of claim for lien: Neglect of clerk. See LIENS, 2.

FINDINGS of fact: Clerical error. See TAX TITLES, 9, 10.

FIRES caused by negligence. See NEGLIGENCE, 3–5.

FIRE INSURANCE. See INSURANCE, 2–4.

FLOWAGE OF LAND.

1. The complaint in this action, stating facts sufficient to constitute a cause of action in tort, at common law, for the flowing of plaintiff's lands by water set back upon them by defendants' dam, but not sufficient to constitute a cause of action under the mill-dam law, is *held* on demurrer to have been intended to plead the former cause of action, although many of the facts stated are not material thereto and some of them seem to evince a purpose to state a cause of action under the mill-dam law. *Irwin v. Richardson*, 429

2. The use of the word "wrongful" was not necessary to a statement of the cause of action in tort. *Ibid.*

FOREIGN LAWS. See EVIDENCE, 1, 4.

FOREIGN WILLS. See WILLS.

FORT HOWARD. See MUNICIPAL CORPORATIONS, 17.

FRANCHISES: Grant: Alteration. See MUNICIPAL CORPORATIONS, 20–24.

FRAUD.

See ATTACHMENT, 2, 3. CONTRACTS, 3. DEBTOR AND CREDITOR. ESTATES OF DECEDENTS, 1. FALSE REPRESENTATIONS. MALICIOUS PROSECUTION. NEGOTIABLE INSTRUMENTS, 5. PARTNERSHIP. SALE OF CHATTELS, 2. TRADE-MARKS, 3. VENDOR AND PURCHASER, 1–3, 10. WILLS, 2.

1. Lands held in trust were secretly conveyed by the trustee, in fraud of the trust, for the benefit of himself and his son-in-law, B. Parts thereof were afterwards sold for a fair consideration to another son-in-law and to the housekeeper of the trustee, who were ignorant of business affairs and relied implicitly upon the statements and honesty of B. *Held*, that the relationship of said vendees to the trustee was not conclusive evidence that they knew of the fraud; nor, under the circumstances, did the fact that they bought from B. but received deeds executed by the trustee charge them with knowledge of any breach of the trust. *Hawley v. Tesch*, 213

2. Other purchasers of a portion of the lands paid a full and adequate consideration therefor to the trustee, who was an old resident and a prosperous business man and had always borne a good reputation. A finding of the trial court that they had no notice of the fraud of

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the trustee is *held* to be sustained by the evidence, although it appeared that there was a close relationship and friendship between them and the trustee and his son-in-law B., and that they never took any pains to ascertain whether B. (who ostensibly joined them in the purchase) paid anything for his interest in the land. WINSLOW, J., dissents. *Ibid.*

3. *Per* WINSLOW, J. Where, in an action by the *cestuis que trustent* to set aside as fraudulent sales of land by the trustee, an interlocutory order is made adjudging that the defendants are *bona fide* purchasers and ordering a reference to ascertain the amount for which the trustees should account, if the plaintiffs do not appeal from such order, but appear before the referee and prosecute to judgment their claim for the consideration moneys of the sales, they should be held to have abandoned their claim to recover the specific property. *Ibid.*

4. A purchaser of lands held in trust, who actively participated in the actual fraud of the trustee for which the sale is set aside at the suit of the *cestuis que trustent*, cannot be credited with improvements voluntarily made on the land; but he may be credited with taxes paid and with the necessary expenses of making sales of the lands to *bona fide* purchasers, of which sales the plaintiffs receive the benefits. *Ibid.*

FRAUDS, STATUTE OF. See PHYSICIANS AND SURGEONS, 4. VENDOR AND PURCHASER, 9.

FRAUDULENT CONVEYANCES. See DEBTOR AND CREDITOR.

GAME LAWS. See CRIMINAL LAW, 15.

GARNISHMENT. See INSURANCE, 2.

GATES. See RIGHT OF WAY.

GOOD BEHAVIOR: Diminution of term. See CRIMINAL LAW, 13.

HABEAS CORPUS. See CRIMINAL LAW, 13.

HIGHWAYS.

See MUNICIPAL CORPORATIONS, 9–16. TOWNS.

1. In an action against a town for injuries alleged to have been caused by a defective highway, it was error to permit a witness for the plaintiff to testify that, on the morning after the accident, the plaintiff pointed out to her the exact place where it occurred. *Schillinger v. Verona*, 317

2. The question as to the insufficiency of an embankment which constituted the approach to a bridge, and which had no railing on either side, is *held*, upon the evidence (which was conflicting as to the width, length, and height of the embankment), to have been a question of fact for the jury. *Ibid.*

3 Upon the first trial of an action against a town for injuries alleged to have been caused by a defective highway, one C. testified for the plaintiff, but upon a second trial he was not called as a witness. In the closing argument to the jury plaintiff's counsel said: "I will offer now, if [defendant's counsel] will agree, to have it [C.'s testimony on the former trial] read in evidence. He don't dare do it." The court ruled that this was improper. Counsel proceeded: "We did not call C. because they elected him a member of the town board of this town. It was a piece of fine work. . . . We could not call C. and ask him what he testified to on a former trial. If

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he changed his evidence we would be bound by his testimony. But we did this,—we called him to the stand and asked the court if we could cross-examine him, under the rule you may cross-examine a party." Upon objection the court ruled that this was proper. *Held*, a material error. *Ibid.*

4. In laying out a so-called "county road" under secs. 1300–1307, R. S., the county officers act, not on behalf of the county, but on behalf of the towns through which the road runs; and where the proceedings are so defective that no legal highway is laid out, the county is not liable for trespasses committed by such officers in attempting to open the road. *Dodge v. Ashland Co.* 577

5. In an action against a town for injuries caused by a defective highway, the town alleged that one P. was primarily liable, and he was made a defendant. The verdict was for the plaintiff against the town and in favor of P., but the judgment entered thereon did not in terms affect P. The town moved for a new trial on the ground, among others, that in finding P. not liable the verdict was contrary to the evidence. The motion was denied, and the town appealed from the judgment. P. was heard on the appeal. The judgment was reversed for errors not relating to the questions between P. and the town, and the cause was remanded for a new trial. *Held*, that this meant a new trial as to all the parties and all the issues. *Duthie v. Washburn*, 597

HOMESTEAD right of widow. See PARTITION.

HUSBAND AND WIFE. See CONTRACTS, 1. DEBTOR AND CREDITOR, 13. ESTATES OF DECEDENTS, 1. MARRIED WOMEN. NEGOTIABLE INSTRUMENTS, 2, 3.

IDENTITY of names on petition and poll list. See COUNTIES, 3, 4.

IMPROVEMENTS on land. See EJECTMENT, 2. FRAUD, 4.

INFANTS. See MASTER AND SERVANT, 10, 11.

INFORMATION. See CRIMINAL LAW, 1, 8–10, 28, 29.

INJUNCTION.

See TOWNS. TRADE-MARKS, 3.

1. In replevin for logs the complaint alleged as the foundation of plaintiff's title thereto that he was the owner of the land from which they were cut, and the answer alleged that the title to both land and logs was in defendant. *Held*, that defendant, to defeat plaintiff's title, might show that tax redemption receipts upon which his claim to the land was partly based were forged and fraudulent, and that a tax deed under which he claimed was void. In respect to such matters, therefore, defendant has a plain and adequate remedy and defense at law, and they constitute no ground for restraining the prosecution of the replevin action. *Wolf River Lumber Co. v. Brown*, 638

2. A judgment in favor of the defendant in such replevin action on the question of the title to the logs would be conclusive as to the title to the lands so put in issue therein, whenever it should come in question between the parties or their privies; and defendant would need no affirmative relief as to such title. *Ibid.*

INSANITY. See ASSAULT AND BATTERY, 1, 3, 4.

INSOLVENCY. See DEBTOR AND CREDITOR. VOLUNTARY ASSIGNMENT.

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INSTRUCTIONS TO JURY.

See APPEAL, 8. ASSAULT AND BATTERY, 1, 2, 4. CRIMINAL LAW, 31, 33, 34, 36. DEBTOR AND CREDITOR, 3–8. MASTER AND SERVANT, 11. MUNICIPAL CORPORATIONS, 15, 16. NEGLIGENCE, 1, 2, 8. RAILROADS, 4. STREET RAILWAYS, 4.

1. Where the jury were instructed as to some of the elements or facts to which attention should be given in forming their estimate of the value of the testimony of witnesses, a failure to call their attention to other elements or facts was not error, in the absence of any request for fuller or more specific instructions. *McCoy v. Milwaukee St. R. Co.* 56
2. So, also, a failure to instruct the jury not to include in the damages compensation for plaintiff's loss of time, etc., during his minority, was not error, where no such instruction was requested. *Ibid.*
3. It is not error to refuse to give special instructions which are substantially given in the general charge. *Jackson v. Wis. Tel. Co.* 243
4. The refusal to give an instruction to the effect that it was incumbent upon the plaintiff to establish the facts essential to a recovery by a *preponderance of proof*, is *held* to have been error, such facts having been contested and nothing equivalent to such instruction having been given in the general charge. *Schillinger v. Verona*, 317
5. An instruction that if the jury concluded that a witness had testified falsely as to any material fact they might disregard all of his testimony unless it was supported by other evidence, was erroneous, since it authorized the jury to disregard the uncorroborated testimony of a witness if they concluded that he had, even through inadvertence or mistake, sworn falsely as to any material fact. *Little v. Superior R. T. R. Co.* 402
6. An instruction that "there is, when a witness is testifying, an undefinable something that rings of truth, that in spite of and in the face of everything" the jury "have a right and should give heed to," was erroneous as being an invasion of the province of the jury; and the error was not cured by a further instruction that the verdict must be based upon the evidence given in the case, and upon nothing else. *Ibid.*
7. Where much of the testimony in an action was in direct conflict, and plaintiff's own testimony conflicted with that given by him on former trials, it was error to charge the jury: "It is your duty to reconcile the testimony, if it is possible, on the theory that every witness has intended to testify truly in the case. The law does not presume, and will not presume, that any witness testified falsely. Therefore, if it is possible for you to reconcile the evidence on the theory that any witness is mistaken either in regard to time or any other fact important to be established in this case, it is your duty to do it. It is better to assume that the witness has made a mistake than to assume he has lied." *Isely v. I. C. R. Co.* 453
8. On the last trial plaintiff was asked, on cross-examination, whether he did or did not, on the former trials, swear as stated in the questions. To some of these questions he answered that he had testified as stated, but that his testimony was untrue. To many of the questions, however, he answered that he could not remember. *Held*, that it was error to charge the jury that "when a witness is asked if he did not testify so and so before, he will generally say that he don't remember,—and I think it is almost impossible for

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witnesses to remember what they have testified to; but they may say: 'I don't know. I tried to testify according to the fact then and I am trying to do it now.' A witness can remember the transaction better than he can remember what he testified about it before. . . . In the excitement of a trial, in the rapidity with which questions are put and are compelled to be answered, a witness will sometimes perhaps not half understand the question, and he will answer accordingly, so as to put himself in a false position," etc. *Ibid.*

9. A charge that the jury must be satisfied by the preponderance of the evidence, to a reasonable certainty, that a fact existed, before they could find such fact, was not erroneous. *Telford v. Frost*, 76 Wis. 172, distinguished. *Pelitier v. C., St. P., M. & O. R. Co.* 521

10. In an action for personal injuries it was not error to charge that if the negligence of defendant's servants was not the proximate cause of the injury it would be robbery, under the forms of law, to compel it to respond in damages. *Ibid.*

11. Where the evidence was sufficient to support a verdict for the plaintiff, it was not error for the court to say, in charging the jury, that the evidence of the plaintiff tended to sustain his cause of action. *Koch v. Ashland,* 603

INSURANCE.

Accident.

1. An accident policy provided that notice of any claim should be given *immediately* after the accident occurred; that proof of death, in like manner and time, should be verified by the attending physician or some other person having personal knowledge of the fact; that unless positive proof of death or injury should be furnished within six months of the date of the accident all claims should be forfeited; and that the insurance should not cover disappearances. The insured, a tugboat engineer, disappeared November 9, 1892. Shortly after, the bay in which the boat lay was frozen over, and on April 19, 1893, when the ice broke up, his body was found in the bay near the boat. Search was immediately made for his daughter, the beneficiary in the policy, who lived in another state, but she did not learn of her father's death until May 24, 1893, when she at once gave notice thereof to the company, and on July 12, 1893, furnished proofs of death. *Held*, that there was a sufficient compliance with the requirements of the policy. The word "immediately" is construed to mean such convenient time as was reasonably requisite for giving the notice after discovery of the death; and the proofs were to be furnished within the six months specified after such discovery. *Kentzler v. Am. Mut. Acc. Asso.* 589

Fire.

2. One A. worked by the day in the erection of a house, and S. & M. furnished lumber therefor. Both wishing insurance, A. took out a policy in his own name for an amount sufficient to cover the claims of both. He intended it to cover both claims, and S. & M. paid one half of the premium. When it was discovered that it did not cover the claim of the latter, there was indorsed on the policy, with A.'s consent: "Loss, if any, under this policy, payable to S. & M. as their interest may appear." The building was afterwards destroyed by fire. In garnishment proceedings against the insurance company by creditors of A., it is *held* that the policy insured only the interest of A., and that the amount of his loss was payable to S. & M. to the extent of their interest. *Edwards v. Agricultural Ins. Co.* 450

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3. The owners of property employed insurance agents to keep it continually insured to a certain amount, a part of the insurance being taken in companies represented by such agents and a part in other companies. To avoid the necessity of sending and returning policies as they were canceled and rewritten from time to time, all of the policies were left with such agents. *Held*, that they had authority to receive, for the insured, notices of cancellation of policies. *Schauer v. Queen Ins. Co.* 561

4. The duties of such agents to the insured and to the insurers were not repugnant. *Ibid.*

INTENT. See DEBTOR AND CREDITOR, 1, 2, 5, 6, 10, 12, 13. TAXATION.

INTEREST.

One who held moneys belonging to a trust estate, but which were claimed by another, was properly charged with simple interest thereon from the commencement of an action therefor by the *cestuis que trustent*, where the other claimant was a party to the action and the holder of the moneys did not bring them into court for the benefit of whichever party should finally be adjudged to be the owner. *Hawley v. Tesch*, 213

JOINDER of parties. See APPEAL, 1. HIGHWAYS, 4, 5. MUNICIPAL CORPORATIONS, 13. TOWNS. WILLS, 2.

JUDGMENT.

Demand of judgment. See FALSE REPRESENTATIONS, 2.

Judgment by default. See APPEAL, 4.

An order sustaining a demurrer to a counterclaim gave leave to amend the answer within ten days after service of notice of the entry of said order. No such notice was served, but, the answer not having been amended, judgment was taken against the defendant as by default. *Held*, that defendant was not in default and that, upon an application made at the same term, such judgment should have been vacated as a matter of right. *Dufur v. Ashland Co.* 574

In ejectment. See EJECTMENT, 1.

In replevin. See DEBTOR AND CREDITOR, 9. INJUNCTION, 2. REPLEVIN, 2, 3.

On appeal from justice's court. See JUSTICES' COURTS, 2.

Affirmative judgment, when ordered by appellate court. See APPEAL, 10.

Judgment on the pleadings: Review on appeal. See APPEAL, 5.

Modification of judgment: Dismissing complaint without prejudice. See VENDOR AND PURCHASER, 9.

Vacating judgment. See *Judgment by default, supra.*

Reversal on appeal or writ of error. See APPEAL, 6, 7. CONTRACTS, 1. CRIMINAL LAW, 21, 22, 31, 35. DAMAGES, 4. DEBTOR AND CREDITOR, 1, 3-9. FALSE REPRESENTATIONS, 6. HIGHWAYS, 5. INSTRUCTIONS TO JURY. NEGLIGENCE, 1, 2. RAILROADS, 4. TAX TITLES, 9, 10.

Res adjudicata. See ESTATES OF DECEDENTS, 7.

Docketing judgment. See EXECUTIONS.

JURISDICTION. See CRIMINAL LAW, 14. JUSTICES' COURTS, 1. PARTITION. WILLS, 2.

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JURORS: Bias. See CRIMINAL LAW, 7.
JURY: Keeping together. See CRIMINAL LAW, 11.
JURY TRIAL. See TRIAL BY JURY.

JUSTICES' COURTS.

See APPEAL, 10. CRIMINAL LAW, 23-25. PROHIBITION.

1. The failure of the circuit court to decide an appeal from justice's court at the term at which it is heard does not work a discontinuance or deprive the court of jurisdiction to decide it at a subsequent term, or even in vacation. *Silvernail v. Rust,* 458
2. Sec. 3769, R. S., as amended by ch. 216, Laws of 1891 (providing that upon the hearing of an appeal from justice's court, "where there is no new trial in the appellate court, such court shall give judgment according to the weight of the evidence and the justice of the case . . . without regard to the findings of the justice"), applies to cases where the judgment in justice's court was given upon the finding of a jury as well as where it was given on a finding by the justice. *Ibid.*

LACHES. See ESTATES OF DECEDENTS, 2. TAX TITLES, 6.
LAND CONTRACT. See LIENS, 3. VENDOR AND PURCHASER, 4-9.
LANDS SOLD FOR TAXES. See TAX TITLES.
LARCENY. See CRIMINAL LAW, 8-12.

LIBEL.

A newspaper publication: "Spoiled a Sensation. An Alleged Shortage at W. Settled by Bondsmen. A rather sensational feature was promised for the meeting of the county board this afternoon. It is alleged that there was a deficit of $2,500 in the accounts of Ex-County Treasurer H. The supervisors claimed that the books were short $2,500. It is claimed, however, for H. that this is for fees collected which belonged to the office and not to the county. The matter was settled by the bondsmen before the meeting of the board," — is not libelous *per se*, and its meaning cannot be enlarged by innuendo. *Hofflund v. Journal Co.* 369

LICENSEE on track: Injuries. See RAILROADS, 3-5.

LIENS.

1. Where a building being erected by a contractor is destroyed before its completion, material men and laborers are not entitled to any lien on the land under sec. 3315, S. & B. Ann. Stats. *Goodman v. Baerlocher,* 287
2. Under sec. 3318, R. S., providing that no lien shall exist unless a claim therefor is filed within six months, the right to a lien is secured when, within that time, a claim is delivered to and left with the clerk to be filed; and the claimant will not be prejudiced by the failure of the clerk to perform his duty. *Ibid.*
3. By the terms of a land contract nothing was paid down, but the vendee was required to erect a building at once, and the title to both the building and the land was to remain in the vendor until full payment was made. *Held,* that the vendor was the owner of the

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premises within the meaning of ch. 349, Laws of 1885, and his interest was subject to liens for labor performed and materials furnished in the erection of such building. WINSLOW J., dissents, being of the opinion that the vendor's claim is a lien and is prior to the liens for labor and materials. *Edwards & McCulloch Lumber Co. v. Mosher*, 672

LIGHTNING causing fire. See NEGLIGENCE, 3–5.

LIMITATION OF ACTIONS. See ESTATES OF DECEDENTS, 2. TAX TITLES, 4, 5, 8.

LIVERY STABLE KEEPERS. See NEGLIGENCE, 2.

LOGS AND TIMBER. See FALSE REPRESENTATIONS, 2–4. INJUNCTION.

MALICE. See ASSAULT AND BATTERY, 5. CRIMINAL LAW, 38.

MALICIOUS PROSECUTION.

In an action for malicious prosecution, a complaint showing that such prosecution was finally determined against plaintiff, and not alleging that the judgment therein was procured by any fraud, misrepresentation, deceit, or circumvention practiced upon plaintiff, is insufficient. *Lawrence v. Cleary*, 473

MALPRACTICE. See PHYSICIANS AND SURGEONS, 3.

MANDAMUS. See COUNTIES, 2, 4.

MARRIAGE AND DIVORCE. See ESTATES OF DECEDENTS, 1, 2.

MARRIED WOMEN.

See DEBTOR AND CREDITOR, 13. NEGOTIABLE INSTRUMENTS, 2, 3.

A married woman, if acting in good faith, may acquire with her separate estate a tax title to land, although her husband is in possession thereof and under legal obligation to pay the taxes; and after she has acquired such title and had it put on record her possession of the land through tenants will be none the less adverse to the original owner because her husband acts as her agent in the management of the property. *Wood v. Armour*, 488

MASTER AND SERVANT.

See CONTRACTS, 1. NEGLIGENCE, 6, 7. RAILROADS, 1.

1. In an action for personal injuries, where contributory negligence was alleged in the answer and the question was largely one of inference from the facts in evidence, the failure to submit that question to the jury was a material error. *Dougherty v. West Superior I. & S. Co.* 343

2. Plaintiff, an employee of defendant, was injured while making cores to be used in casting iron pipe, by having his hand caught in hay which he was putting upon a revolving spindle driven by steam. Upon the evidence—showing, among other things, that he was twenty-eight years old, and was familiar with the way in which the work was done, and had worked for the defendant about fifteen months in making cores upon a machine run by hand; that the velocity of the spindle driven by steam was not materially greater than that of those turned by hand; and that the danger of having

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his hand caught was obvious — it is *held* that such injury was one of the ordinary risks of the employment assumed by the plaintiff, and hence that he cannot recover for the injury. *Ibid.*

3. The fact that plaintiff had objected to working on the spindle driven by steam, and had done so only because told by defendant's foreman to "go there or get out," does not obviate the objection to a recovery, founded on plaintiff's assumption of the risk. *Ibid.*

4. Plaintiff was injured by the caving in of the sides of a trench about nine feet deep in which he was calking water pipe for defendant. He was a man of mature years and ordinary intelligence, and had had considerable experience in that sort of work, and knew that trenches of that depth were liable to cave in. The same trench had partially caved in a few feet away about ten minutes before, and plaintiff with others had left the work, but he had returned upon being told to go back by defendant's superintendent, who said the ditch was perfectly safe and promised to buy some lumber and have it braced up. *Held* that, notwithstanding such direction, and such assurance of safety by the superintendent, the plaintiff, having full knowledge of the danger, assumed the risk when he chose to continue his work. *Showalter v. Fairbanks, Morse & Co.* 376

5. It appearing that plaintiff in going back to work relied upon the assurance that the ditch was safe and not upon the promise to have it braced up, such promise did not entitle him to continue work without being charged with assumption of the risk. [Whether reliance upon a promise to remove the danger could operate in such a case to relieve a workman from assumption of risk, is doubtful.] *Ibid.*

6. The promise to buy lumber and have the trench braced up could not be construed to refer to that part in which plaintiff was working when injured, since in the natural course of the work he would have been through there before the materials to brace the trench could be got. *Ibid.*

7. Plaintiff was injured while working for defendant as a riveter on a "whaleback" vessel, by reason of the improper and dangerous manner in which a scaffold had been suspended and adjusted for him to work upon. It was the custom and understanding that all scaffolds should be supplied for the riveters by the defendant, and placed in position and adjusted by men employed by defendant for that special purpose and doing the work under its supervision, and that the riveters should give them no assistance or directions except to indicate where the scaffolds should be placed. *Held*, that the scaffold builders were not fellow-servants with plaintiff, but were charged with the duty which defendant owed him of providing a safe place for him to work, and hence their negligence in that respect is the negligence of the defendant. *Cadden v. American Steel Barge Co.* 409

8. The testimony of a witness as to the custom in respect to the relation between the scaffold builders and the riveters was properly excluded, where it appeared that he knew only what defendant's superintendent had told him. *Ibid.*

9. The evidence — showing among other things that plaintiff was not present while the scaffold was being placed; that he was told by the scaffold builders that it was all right; that before getting down upon it he looked over the side of the vessel to see if it was all right, and it appeared to be so; and that two other persons, who

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viewed it from different directions, testified that it tipped the wrong way — is *held* to sustain a finding by the jury that plaintiff was not guilty of contributory negligence. *Ibid.*

10. It is a question of fact for the jury whether a minor servant was of sufficient age, intelligence, discretion, and judgment to bring him within the operation of the rule applicable to adults, by which knowledge of open and obvious defects and dangers is imputed to them, and they are held to assume the risk incident thereto if they continue in the employment. *Luebke v. Berlin M. Works,* 442

11. The question in such a case, however, is not what the minor servant *in fact* knew or comprehended as to the danger to which he was exposing himself, but what he ought to have known and understood, in view of his age, intelligence, discretion, and judgment; and, upon request, the jury should be so instructed. *Ibid.*

MAXIM.
Noscitur a sociis, 519.

MEASURE OF DAMAGES. See DEBTOR AND CREDITOR, 9. FALSE REPRESENTATIONS, 1, 4. SALE OF CHATTELS, 4.

MECHANICS' LIENS. See LIENS.

MEDICAL JURISPRUDENCE. See PHYSICIANS AND SURGEONS.

MILLS AND MILL-DAMS. See FLOWAGE OF LAND.

MILWAUKEE: City attorney. See MUNICIPAL CORPORATIONS, 1–4.

MILWAUKEE MUNICIPAL COURT.

By virtue of sec. 2500, R. S., as amended by ch. 256, Laws of 1879, ch. 435, Laws of 1887 (which provides that when an application is made in any circuit court for a change of venue on account of the prejudice of the judge, he may call upon any circuit judge to attend and hold his court for the trial of the case) applies to the municipal court of Milwaukee county. WINSLOW, J., dissents. *Koetting v. State,* 502

MINORS. See MASTER AND SERVANT, 10, 11.

MISDEMEANOR or felony? See CRIMINAL LAW, 15.

MISTAKE. See AGENCY, 4. TAX TITLES, 10.

MUNICIPAL CORPORATIONS.

Officers: Election or appointment: Extension of term: Constitutional law.

1. The territorial charter of the city of Milwaukee having provided for a city attorney to be appointed by the common council, that office existed prior to the state constitution, and is governed by sec. 9, art. XIII, thereof, which provides that all city officers whose election or appointment is not provided for in the constitution shall be elected by the electors or appointed by such authorities as the legislature shall designate. *State ex rel. Hamilton v. Krez,* 135

2. In an act (ch. 35, Laws of 1889) changing the term of office of the city attorney of Milwaukee from two to four years, a provision that the term of office of the then incumbent be extended two years is, in effect, an appointment to the office, and is invalid under sec. 9, art. XIII, Const. *Ibid.*

3. Such act operates to extend the term of the city attorney elected at the regular election next ensuing its enactment. *Ibid.*

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4. No repeal or change of the former law fixing the time for the next regular election for city attorney could be implied from the void provision of the act. *Ibid.*

Classification: Constitutional law: General or special law.

5. Cities in this state being divided into two classes — those incorporated under special laws and those chartered under the general law,— a statute conferring a new power upon all the cities in the former class is a general law and uniform in its operation throughout the state, within the meaning of sec. 32, art. IV, Const. *Johnson v. Milwaukee,* 383

6. A construction of a statute, not inconsistent with its words, which will support its constitutionality will be preferred to a more natural or obvious construction which would render it invalid. Thus, a statute granting certain powers to "any city operating under a special charter . . . and authorized by such charter to construct sewers," may be construed to apply to all cities whose special charters, *either expressly or by implication,* authorize them to construct sewers. *Ibid.*

7. All cities of this state acting under special charters, being authorized thereby to repair and keep in order their streets, are "authorized by such charters to construct sewers," within the meaning of ch. 224, Laws of 1893, since the authority first mentioned carries with it the latter. *Ibid.*

8. A statute conferring certain powers upon all specially chartered cities which have or shall attain a certain population, is a general law, within the meaning of sec. 32, art. IV, Const., where the object to be advanced by it bears such a relation to population as to justify a classification upon that basis. Ch. 311, Laws of 1893, giving authority to all specially chartered cities having a population of 3,000 or more to issue bonds for the construction of sewers, for the purchase of lands for public parks, and for permanent street improvements, is *held* a general law and valid. *Ibid.*

Injuries from defective sidewalks: Notice: Primary liability.

9. A notice that plaintiff was injured "while walking home on the sidewalk on Madison street, opposite the Moravian church, owing to a defective sidewalk," is not sufficient under sec. 1339, R. S., since it wholly fails to describe the alleged defect. *Van Loan v. Lake Mills,* 430

10. A lot owner is not liable for injuries resulting from mere defects in the sidewalk in front of his lot, unless made so liable by statute. *Cooper v. Waterloo,* 433

11. A village charter providing that in certain cases the trustees should require lot owners to build or repair sidewalks, and if the latter failed to do so should have power to cause the work to be done at the expense of the lots, and ordinances passed in pursuance thereof, did not render a lot owner liable for an injury caused by a defect in the sidewalk which he was by such ordinances required to repair. *Ibid.*

12. Sec. 1, ch. 471, Laws of 1889 (sec. 1339*b*, S. & B. Ann. Stats.),— providing that the person by whose wrong, default, or negligence a defect in the highway is caused shall be primarily liable for injuries happening by reason of such defect,— was not intended to create any liability or give any new right of action, but merely to regulate the remedy for rights of action otherwise created. *Ibid.*

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[13. Whether, under ch. 471, Laws of 1889, where a lot owner or other person is primarily liable for an injury resulting from a defect in the highway, the plaintiff can be compelled to make him a defendant in an action for such injury against the municipality, not determined.] *Ibid.*

14. A notice of injury from a defective sidewalk, given pursuant to sec. 1339, R. S., described the defect as an "unsound, defective, and dangerous condition" of the walk. It was proved that both the plank and stringers of the walk were rotten. *Held*, that the notice described "*generally* the insufficiency or want of repair," and was sufficient. *Van Frachen v. Ft. Howard*, 570

15. In an action for injuries sustained by falling on an icy sidewalk, which, it was claimed, the plaintiff knew was dangerous, an instruction that the jury must find, if they returned a verdict for the plaintiff, that there was no negligence on his part contributing to the injury; that he was not bound to use extraordinary care; and that if he used ordinary care, or such care as a man of ordinary care, prudence, caution, and judgment would have used under the circumstances of the case, he was not guilty of contributory negligence,— is *held* to have stated the rule with approximate correctness and sufficient clearness. If the defendant desired a more definite or explicit instruction, it should have been asked. *Koch v. Ashland*, 603

16. An instruction, in such case, "that if the defect had existed for such a length of time that the city authorities, by the use of due diligence, which the law imposed, might have learned of the unsafe condition of the walk, they were charged by the law with notice the same as if actually served upon them or the plaintiff had notified them before he was injured; and after ascertaining the facts they would have a sufficient time to remedy the defect. They should use sound discretion, and use most diligence in the most populous parts of the city," — is *held* not erroneous. *Ibid.*

Presentation of claim or demand: Tort actions.

17. A provision in a city charter that no action shall be maintained against the city "upon any *claim or demand of whatsoever nature*, other than a city bond or order," unless such claim or demand shall first be presented to the common council, is *held* to apply to tort actions. *Vogel v. Antigo*, 81 Wis. 642, distinguished. *Van Frachen v. Ft. Howard*, 570

18. Sec. 161, ch. 151, Laws of 1883, providing that "no action in tort shall lie or be maintained against the city of Wausau unless a statement" of the wrong and of the damages claimed shall be presented to the common council within ninety days after the occurring of the tort alleged, is applicable to an action for damages on account of a nuisance created by the city, and the presentation of such statement must be alleged in the complaint. *Hughes v. Fond du Lac*, 73 Wis. 380, distinguished. *Steltz v. Wausau*, 618

Street improvements: Special assessments.

19. The city charter of Ashland provides (Laws of 1889, ch. 27, subch. 17) that the expense of paving streets may be charged to abutting lots in proportion to the benefits accruing thereto; that before the work is ordered the board of public works shall ascertain the entire cost, and determine the amount of damages and benefits accruing to each lot, and file a report thereof; that after hearing objections they shall make and file a corrected report, which may be mod-

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ified by the common council, and when it has been finally confirmed by that body a notice shall be published that a final determination as to the benefits to be assessed has been made; that appeals from such determination may be taken by any person aggrieved; that bids shall be advertised for and the contract let by the board of public works; and that after the work is done the "contractor shall be entitled to a certificate therefor as to each parcel of land against which benefits shall have been assessed for the amount chargeable to said lot." *Held*, that both the preliminary assessment and the final determination of the benefits are to be made before the contract is let or the work done; and an assessment made after the contract had been performed, charging the entire cost of the work (considerably greater than the estimated cost) to the abutting lots, apparently by the front-foot rule, without determining that they were benefited in any amount, is void. *State ex rel. Moore v. Ashland*, 599

Grant of franchise to water company: Alteration: Regulation of rates.

20. Ordinances passed by a town board granted to a corporation a franchise to furnish water for an unincorporated village within the limits of the town. Afterwards the village became a city, and an ordinance thereof granted and confirmed to the corporation all the rights and franchises conferred by said town ordinances (which were incorporated in and made a part of the city ordinance), subject to certain modifications. The city ordinance also fixed the rates which the corporation might charge, and provided that, when accepted, it should constitute a contract between the city and the corporation. *Held*, that if the town ordinances were invalid because enacted without authority, they became valid as a part of the city ordinance, which was authorized by its charter, and the latter ordinance, upon acceptance of its conditions, became a valid contract between the corporation and the city. *Ashland v. Wheeler*, 607

21. In the absence of an express delegation of such authority, the common council of the city had no power to repeal, alter, or impair such franchise or contract; and an ordinance attempting to reduce the rates which the corporation might charge was invalid. *Ibid.*

22. The amended charter of Ashland,—providing (in subch. 11, ch. 27, Laws of 1889) that "whenever the waterworks shall be owned by the city, the same shall be operated under the direction of the board of public works," and that "the common council shall have power to legislate on all matters with reference to the construction, operation, management, and protection of the waterworks of the city, not contravening the provisions of this act, or the constitution or laws of this state, or contracts already made," etc.,—gave the common council no power to alter or repeal a franchise theretofore granted to a water company. *Ibid.*

23. The validity of the grant of a franchise to a water company cannot be questioned collaterally, in a prosecution of one of its officers for the collection of excessive rates, on the ground that a member of the city council, whose vote was necessary to pass the granting ordinance, was a stockholder in the company, or that the rentals to be paid by the city constituted a debt in excess of the constitutional limit. *Ibid.*

24. If an ordinance granting a franchise to a water company and the contract resulting from its acceptance are void, a subsequent ordinance attempting to alter the rates which the company is allowed

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to charge for furnishing water can have no validity, since in that respect neither the city nor the company owes any duty to the other. *Ibid.*

MUNICIPAL COURTS. See CRIMINAL LAW, 14. MILWAUKEE MUNICIPAL COURT.

MURDER. See CRIMINAL LAW, 17, 18.

NAMES on petition and poll list: Identity. See COUNTIES, 3, 4.

NEGLIGENCE.

See MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 12, 13, 15, 16. RAILROADS. STREET RAILWAYS. VERDICT, 2, 3.

1. In an action for personal injuries caused by negligence, it was error to charge the jury that, as there were but two versions of the facts respecting defendants' negligence,— the burden of proof as to his version being on the plaintiff, and as to their version being on the defendants,— it was immaterial, or very nearly immaterial, how the burden of proof lay. *Ohlweiler v. Lohmann,* 75

2. In an action for personal injuries caused by a vicious horse hired from defendants, it was error to charge that unless defendants were clearly satisfied that the horse was safe without a kicking strap, or if there was reason to doubt its safety without such strap, it was negligence to let it without one. *Ibid.*

3. Upon a plateau about eighty feet above the surrounding country stood plaintiff's barn and another building, about 325 feet apart, each having on its top a flagpole twenty to thirty feet high. A telephone company had left a wire attached to the pole on the other building and running thence to the roof of the barn. During a storm the other building was struck by lightning, and a few minutes — or seconds — later flames broke out on the roof of the barn, and it was destroyed. The evidence showed that the barn was fired by lightning, and tended to show that there was but one flash or stroke; that the flagpole on the other building was shattered down to about the place where the wire was attached, but the building was otherwise uninjured; and that the flagpole on the barn was not damaged by the lightning. *Held,* that the evidence sustained a verdict to the effect that the negligence of the telephone company in leaving the wire in that condition was the proximate cause of the burning of the barn. It cannot be said, as matter of law, that it was entirely improbable that the other building, situated as it was, should be struck by lightning; and the verdict finding that the bolt which struck that building was the same bolt which fired the barn cannot be said to be based on mere conjecture. NEWMAN and PINNEY, JJ., dissent, being of opinion that the neglect of the company to remove the wire, if a cause of the loss, was a remote cause. *Jackson v. Wis. Telephone Co.* 243

4. The question whether it was possible or probable that the lightning striking the other building would be conducted over the telephone wire so as to set fire to the barn more than 300 feet away, was properly a question for the jury on the evidence, including the opinions of experts. *Ibid.*

5. The telephone company cannot escape liability for its negligence on the ground that the stroke of lightning was "an act of God." *Ibid.*

6. By a contract with the defendant company, which was the principal contractor for the erection of an elevator building, a fire extin-

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guisher company was to construct and place certain apparatus in the building, and the defendant was to furnish the staging needed in performing the work. Through defendant's negligence a defective plank was used in such staging, and by reason thereof an employee of the fire extinguisher company was killed. *Held*, that the defendant was liable for such death, although there was no privity or contract relation between it and the deceased, on the ground that it had impliedly invited him to use such staging, and also on the ground that the negligent use of the defective plank was an act imminently dangerous to human life. *Bright v. Barnett & Record Co.* 299

7. The plank having been used in a place where the deceased could not see the defect on account of darkness, he was not chargeable with contributory negligence in walking upon it. *Ibid.*

8. An instruction that "ordinary care is such care as the majority of persons would exercise under the circumstances," was correct. *Ibid.*

9. In an action to recover one half of the amount for which a threshing machine belonging to plaintiffs and defendant was sold by the latter, the evidence is *held* to support a verdict adverse to the defendant's counterclaim for damages by reason of an injury to the machine caused, prior to the sale, by plaintiffs' negligence. *Schwin v. Hellriegel*, 457

NEGOTIABLE INSTRUMENTS.

Promissory notes.

1. At the maturity of a note the maker asked for an extension of time, offering to have his wife sign the note. The payee agreed to grant an extension if a surety on the note would consent. The maker represented that he had seen the surety and knew he would consent, and thereupon the wife signed the note; but the surety, when applied to, refused his consent to the extension. Afterwards the payee caused judgment to be entered on the note against the maker and his wife and the surety. *Held*, that by so doing he was estopped to assert that there was no extension or that there was no consideration for such extension because the note was not valid as against the maker's wife; and that the surety was discharged from liability. [Whether the mere addition of the signature of the maker's wife, without the consent of the surety, was such an alteration of the note as to defeat any remedy on it against the latter, not determined.] *Donkle v. Milem*, 33

2. A wife may avoid her note made under duress of threats of criminal prosecution of her husband. *City Nat. Bank v. Kusworm*, 188

3. Under duress of threats of criminal prosecution of her husband on the charge of forging notes deposited as collateral security for his own notes to a bank, a wife gave her note to the bank for the amount of her husband's notes. The cashier of the bank thereupon delivered the husband's notes and the collaterals to a friend of the wife, who, at once, in the presence of the cashier, handed them to her, telling her to give them to her husband, and she afterwards did so. In an action by the bank upon the wife's note, it is *held* that she may avoid it on the ground of duress without restoring her husband's notes or the collaterals to the bank. WINSLOW and PINNEY, JJ., dissent. *Ibid.*

4. Where a promissory note stipulates for the payment of attorney's fees if suit be instituted thereon, such fees may be recovered in the action on the note. *Vipond v. Townsend*, 285

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5. In an action upon a promissory note the evidence tended to show, among other things, that plaintiff had procured defendant's arrest in an action for false imprisonment, and had caused him to be taken at once a long distance from his home and friends, thus depriving him of the opportunity to give bail; that plaintiff and his attorney then refused sufficient bail, which was offered, and refused to give defendant an opportunity to get other bail, and made him believe that he could avoid going to jail only by settling with them; and that he settled accordingly, giving the note in suit. *Held*, that it was a question for the jury whether the defense of fraud and duress was established. *Behl v. Schuett*, 471

Bank checks. See VENDOR AND PURCHASER, 5.

6. Checks drawn on a Milwaukee bank were indorsed by defendant and delivered to plaintiff's agent at Dousman on July 17, and the agent at once mailed them to the plaintiff at New Richmond, where they were received on July 18 and at once delivered to a local bank for collection. That bank, having no correspondent in Milwaukee, immediately mailed the checks to its correspondent in Chicago, and from there they were forwarded to Milwaukee, but were not presented for payment until July 21. The bank upon which they were drawn had then failed, having closed its doors at the usual hour on July 20. If the checks had been sent directly to Milwaukee from New Richmond they would have arrived in time for presentation on July 20, and if then presented would have been paid. *Held*, that they were not presented within a reasonable time after their indorsement and delivery by defendant, and that he was not liable as indorser thereon. *Gifford v. Hardell*, 538

7. The period of reasonable time for presentation, as between the plaintiff and the defendant as indorser, began when the checks were delivered to plaintiff's agent. *Ibid.*

8. In general, when a check is received in a place distant from the place where the bank on which it is drawn is located, the rule of diligence requires that it should be forwarded to the latter place on the next secular day after its receipt, and be presented for payment on the day after it has reached such place by due course of mail. *Ibid.*

NEWSPAPERS. See LIBEL.

NEW TRIAL. See HIGHWAYS, 5.

NIGHT TIME. See CRIMINAL LAW, 16.

NORMAL SCHOOLS.

1. The power to remove a teacher "at pleasure," given to the board of regents of normal schools by subd. 3, sec. 404, R. S., is a discretionary one, and its exercise in a given case cannot be inquired into by the courts. *Gillan v. Board of Regents*, 7

2. The statute giving such power of removal becomes a part of every contract made by the board with a teacher for his employment in a normal school; and the board can make no by-law or contract by which such power is bargained away, limited, or restricted. *Ibid.*

3. When by the exercise of such power the contract relation between a teacher and the board is terminated, and he has received notice thereof, his right to any further salary or compensation is also terminated. *Ibid.*

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NOTARY PUBLIC. See EVIDENCE, 3, 4.

NOTICE.
Of reception of verdict. See CRIMINAL LAW, 30.
Of claim under accident policy. See INSURANCE, 1.
Of entry of order. See JUDGMENT.
Of injury from defective sidewalk. See MUNICIPAL CORPORATIONS, 9, 14.
Of defect in sidewalk. See MUNICIPAL CORPORATIONS, 16.
To redeem from tax sales. See PUBLICATION OF LEGAL NOTICES, 1.
Of election. See PUBLICATION OF LEGAL NOTICES, 2, 3.

NUISANCE. See FLOWAGE OF LAND. MUNICIPAL CORPORATIONS, 18.

OFFICERS.
Election. See MUNICIPAL CORPORATIONS, 1–4.
Bank officers. See CRIMINAL LAW, 26.
City attorney. See MUNICIPAL CORPORATIONS, 1–4.
Clerk of circuit court. See LIENS, 2.
Commissioners of the public lands. See PUBLIC LANDS, 2, 3.
County board. See COUNTIES. HIGHWAYS, 4.
County treasurer. See LIBEL. TAX TITLES, 11.
Pathmaster. See TOWNS.
Regents of normal schools. See NORMAL SCHOOLS.
Sheriff. See DEBTOR AND CREDITOR, 3. EXECUTIONS, 1. REPLEVIN, 3.
Town supervisors. See HIGHWAYS, 3. TOWNS.

OPTION to purchase land. See AGENCY, 1, 2.

ORDERS: Entry: Practice. See JUDGMENT.

ORDINANCES. See MUNICIPAL CORPORATIONS, 20–24.

PARENT AND CHILD. See CRIMINAL LAW, 14. DEBTOR AND CREDITOR, 11–13.

PARTIES. See APPEAL, 1. CORPORATIONS, 4. DEBTOR AND CREDITOR, 3. HIGHWAYS, 4, 5. MUNICIPAL CORPORATIONS, 13. REPLEVIN, 1. TOWNS. VOLUNTARY ASSIGNMENT, 2. WILLS, 2.

PARTITION.

The homestead right of a widow is not subject to partition, and the circuit court has no jurisdiction in partition proceedings to order a sale of the land so as to divest her of such right. NEWMAN, J., dissents. *Voelz v. Voelz*, 461

PARTNERSHIP.

See VOLUNTARY ASSIGNMENT, 1.

Pursuant to a partnership agreement, each of the three partners individually bought an undivided one-third part of certain lands and contributed it to the capital stock of the firm. *Held*, that the purchase was not in any sense a purchase by the firm, and that the fraud of one of the partners in the acquisition of his one-third did not affect the purchases of the others. *Hawley v. Tesch*, 213

PENALTIES. See TAXATION.

PERPETUATION of testimony. See EJECTMENT, 1.

PETITION for removal of county seat. See COUNTIES.

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PHYSICIANS AND SURGEONS.

1. In an action for personal injuries, a physician who had before been treating the plaintiff, and who was consulted by him on the day after the accident for the purpose of obtaining treatment, may testify to symptoms then existing, although he cannot distinguish between what he himself observed and what the plaintiff told him, and it appears that the plaintiff already contemplated suit. *Stone v. C., St. P., M. & O. R. Co.* 98

2. In an action for services as a physician the answer, "by way of a further and second counterclaim," alleged malpractice, and that defendant had paid plaintiff a certain sum which he had not earned by reason of his want of skill, etc., and that defendant claims to recover the same back "as a counterclaim against him herein." A separate paragraph, immediately following, stated "that in consequence of his want of medical skill and of his failure to treat her as he should have done, as a skilful physician and surgeon, *as above set forth*" defendant suffered damage to a certain amount, "and sets up the same in this answer as a counterclaim," etc. *Held*, that all the allegations mentioned constituted but one counterclaim, with a statement of separate items of damage under it. *Jones v. Burtis*, 478

3. To state a cause of action against a physician for malpractice, it is not necessary to aver that it was his duty to act skilfully, since that will be implied from his employment as a physician. *Ibid.*

4. Plaintiff, as a surgeon, attended an injured employee of defendant, having been called by a third person. After a part of the services had been rendered and charged to the employee on plaintiff's books, defendant's manager said to him: "Take care of Jim [the employee]. We intend to see the boy through." *Held*, that if this was a promise to pay for plaintiff's services it was not valid as to the services already rendered, because not in writing as required by subd. 2, sec. 2307, R. S. *Malone v. Knickerbocker Ice Co.* 542

PLACE OF TRIAL. See CHANGE OF VENUE. CRIMINAL LAW, 4, 5. MILWAUKEE MUNICIPAL COURT. TRIAL BY JURY, 2.

PLEADING. See COUNTIES, 2. CRIMINAL LAW, 1, 3, 8–10, 26, 28, 29. DAMAGES, 2. EJECTMENT. FALSE REPRESENTATIONS, 2, 3. FLOWAGE OF LAND. JUDGMENT. MALICIOUS PROSECUTION. MUNICIPAL CORPORATIONS, 18. PHYSICIANS AND SURGEONS, 2, 3. REPLEVIN, 2. SALE OF CHATTELS, 5.

POSSESSION of land. See EJECTMENT, 2. MARRIED WOMEN.

POWER OF ATTORNEY.

See EVIDENCE, 2, 3.

A power of attorney need not be attested or recorded to be a valid power to convey lands. *Slaughter v. Bernards*, 111

PRACTICE. See APPEAL. ASSAULT AND BATTERY, 3. CHANGE OF VENUE. CORPORATIONS, 4. COSTS. CRIMINAL LAW AND PRACTICE. DEBTOR AND CREDITOR, 9. EJECTMENT. ESTATES OF DECEDENTS, 3–5, 8, 9. EVIDENCE. EXECUTIONS. FALSE REPRESENTATIONS, 3. HIGHWAYS, 3, 5. INSTRUCTIONS TO JURY. INTEREST. JUDGMENT. JUSTICES' COURTS. LIENS, 2. MILWAUKEE MUNICIPAL COURT. MUNICIPAL CORPORATIONS, 9, 13–18. NEGLIGENCE, 1. PROHIBITION. REPLEVIN. SALE OF CHATTELS, 5. TAXATION. TRIAL BY JURY. VENDOR AND PURCHASER, 9. VERDICT. VOLUNTARY ASSIGNMENT. WILLS.

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PREFERRED CREDITOR. See BANKS AND BANKING.

PREJUDICE of judge. See CRIMINAL LAW, 4, 5, 24.

PRESUMPTIONS. See EVIDENCE, 2-4. EXECUTIONS, 3.

PRIMARY LIABILITY. See APPEAL, 1. HIGHWAYS, 5. MUNICIPAL CORPORATIONS, 10-13.

PRINCIPAL AND AGENT. See AGENCY.

PRIORITY of liens. See LIENS, 3.

PROHIBITION.

A writ of prohibition will not issue to restrain a justice of the peace from proceeding with a preliminary examination, merely because of a defect in the warrant of arrest or because of an alleged former jeopardy of punishment, the ordinary legal remedies being adequate. *State ex rel. De Puy v. Evans*, 255

PROMISSORY NOTES. See NEGOTIABLE INSTRUMENTS, 1-5.

PROOFS of death. See INSURANCE, 1.

PROXIMATE CAUSE. See NEGLIGENCE, 3. RAILROADS, 4.

PUBLIC LANDS.

1. Lands belonging to the school fund cannot, under sec. 2, art. X, Const., be set apart by the legislature for a state park. *State ex rel. Sweet v. Cunningham*, 81

2. The legislature cannot withhold school lands from sale, since, by sec. 8, art. X, Const., that power is confided to the discretion of the commissioners of public lands. *Ibid.*

3. Under sec. 8, art. X, Const. providing that the commissioners of public lands "shall have power to withhold from sale any portion" of the school lands "when they shall deem it expedient," the commissioners have power to withdraw from sale school lands which have once been offered at public sale. *Ibid.*

4. Under ch. 222, Laws of 1885, public lands which have once been withdrawn from sale become again subject to private sale only after they have been re-offered at public sale. *Ibid.*

5. Ch. 222, Laws of 1885, applies to lands withdrawn from sale before its passage, as well as to those afterwards withdrawn, but does not for that reason have a retroactive effect, since it operates only upon conditions existing at the time of its passage or arising afterwards, and upon sales made after its passage. *Ibid.*

PUBLICATION OF LEGAL NOTICES.

1. Parcels of land which have been properly assessed together as one tract constitute but one "lot or tract" within the meaning of sec. 1174, R. S., and but one fee is due for the publication thereof in the tax redemption notice. *Bohan v. Ozaukee Co.* 498

2. An election notice, with the nominations and information to voters, required to be published by secs. 11, 12, ch. 379, Laws of 1891, is a "legal notice" within the definition in sec. 4276, R. S., and the fees for publishing it are those prescribed in sec. 4275. *Ibid.*

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3. The word "folio," as used in said sec. 4275, means, as defined in subd. 14, sec. 4971, R. S., "one hundred words or figures;" and, whatever the custom may be, compensation for publishing an election notice should be made according to the actual number of words and figures contained therein, and not according to the space occupied. *Ibid.*

PUNITORY DAMAGES. See DAMAGES, 4.

QUANTUM MERUIT. See CONTRACTS, 4.

QUIA TIMET. See EJECTMENT, 1. TAX TITLES, 11.

QUITCLAIM DEED. See EJECTMENT, 2.

QUO WARRANTO. See CORPORATIONS, 4. MUNICIPAL CORPORATIONS, 28.

RAILROADS.

Ejection of person from freight train: Injuries.

1. The conductor of a freight train prohibited from carrying passengers was acting within the scope of his authority in compelling a would-be passenger to leave the train, and the railway company is liable for injuries to the latter caused by his ejection while the train was in motion so that it was dangerous for him to get off. *Stone v. C., St. P., M. & O. R. Co.* 98

Injuries to persons on tracks, etc.

2. Plaintiff was injured by a passing construction train while attempting to drive across defendant's track. He was a teamster by trade, and knew the surroundings perfectly, and knew that this train was running at all times. While approaching the track he had looked and had seen no train, but had afterwards stopped for a minute or more behind a building thirty feet distant from the track, which cut off his view in the direction from which this train came, and had then driven towards the track without looking in that direction until he had passed the building twelve or fourteen feet and his horses' heads were within four or five feet of the track. *Held*, that he was guilty of contributory negligence. *Nelson v. D., S. S. & A. R. Co.* 392

3. A boy, sixteen years old and familiar with railway trains, who deliberately placed himself upon a railway track twenty feet in front of, and with his back towards, an engine which he knew was liable to move at any time, was guilty of contributory negligence precluding a recovery for an injury caused by negligence (which was not gross or wanton) in moving such engine; and it is immaterial whether he was at the time upon a licensed way or was a mere trespasser on the track. *Lofdahl v. M., St. P. & S. S. M. R. Co.* 421

4. In an action for personal injuries to a child who was run over by cars which were being backed, without warning, at a place where people were accustomed to cross defendant's railroad track, after the jury had been fully instructed as to the duty of defendant to keep a lookout in such places, the omission of any reference to the want of a lookout, in giving an illustration of the meaning of the term "proximate cause," was not error, where the jury were afterwards told that it was for them to consider whether, by the exercise of ordinary care, the trainmen might have known that the child was on or near the track,— it being thus plainly left to the jury to determine whether a proper lookout would have avoided the accident. *Pelitier v. C., St. P., M. & O. R. Co.* 531

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5. Plaintiff, the foreman of a gang of laborers engaged in unloading building material from freight cars on a spur track, was injured by the falling of a movable platform which had been constructed by his employers for use in the work, and which at this time was standing so near the track that it was struck and knocked down by a car of more than ordinary width which was being pushed in upon that track in the customary course of defendant's business. *Held*, that plaintiff was a mere licensee to whom defendant owed no duty of active care, and that defendant was not liable for the injury. *McCabe v. C., St. P., M. & O. R. Co.* 531

6. Plaintiff's intestate, wishing to move a car loaded with lumber a short distance in the mill yard in which he was foreman, had it started by a horse on a down grade. Being unable to stop it with the brake, which was defective, he jumped from the car and ran in front of it, and attempted to stop it by putting chips, etc., under the wheels, but it continued to move, he jumping backward in front of it, until it struck and knocked down a movable tramway which extended across the track about 100 feet from the starting point. The planks of the tramway, in falling, struck and threw him under the car, and he was fatally injured. There was ample room for him to have run or walked by the side of the car, and blocks and pieces of wood there by which it could have been stopped. He knew the tramway was in the way, and that a loaded car would strike it. *Held*, that he was guilty of contributory negligence in unnecessarily putting himself in front of the car, in a place of danger. *Culbertson v. M. & N. R. Co.* 567

Street railways. See STREET RAILWAYS.

RAPE. See CRIMINAL LAW, 32–34.

REAL ESTATE AGENTS. See AGENCY, 1–4. CONTRACTS, 2, 3. VENDOR AND PURCHASER, 1, 2, 5.

REAL PROPERTY. See AGENCY, 1–4. CONTRACTS, 2, 3. DEBTOR AND CREDITOR, 13. EJECTMENT. EVIDENCE, 2–4. FALSE REPRESENTATIONS, 1. FLOWAGE OF LAND. FRAUD. HIGHWAYS, 4. INJUNCTION. LIENS. MARRIED WOMEN. PARTITION. PARTNERSHIP. POWER OF ATTORNEY. PUBLIC LANDS. RIGHT OF WAY. TAX TITLES. VENDOR AND PURCHASER. WILLS.

REASONABLE DOUBT: Instructions. See CRIMINAL LAW, 34, 36.

RECITALS in tax deeds. See TAX TITLES, 1, 2.

RECORD.
Conclusiveness. See APPEAL, 9. TAX TITLES, 10.
Amendment. See CRIMINAL LAW, 17.

RECORDING of deeds, etc. See POWER OF ATTORNEY. TAX TITLES, 3, 5, 7. WILLS, 1.

REDEMPTION from tax sales. See TAX TITLES, 11.

REGENTS: Power to remove teachers. See NORMAL SCHOOLS.

REGISTRY of deeds. See POWER OF ATTORNEY. TAX TITLES, 3, 5, 7. WILLS, 1.

RELATIONSHIP as evidence of fraud. See DEBTOR AND CREDITOR, 10. FRAUD, 1.

REMARKS by court. See CRIMINAL LAW, 12.

REMOVAL of county seat. See COUNTIES.

REMOVAL of cause. See CRIMINAL LAW, 24.

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REPEAL.
Of franchises. See MUNICIPAL CORPORATIONS, 21, 22.
Of statutes. See MUNICIPAL CORPORATIONS, 4.

REPLEVIN.

See DEBTOR AND CREDITOR, 9. INJUNCTION.

1. Under sec. 2801, R. S., an action of replevin may be continued by the original plaintiff although, pending the action, he has sold the property. *Johnston v. King,* 211
2. In replevin the answer was a general denial. The property was taken by the writ, but remained in the hands of the officer. The verdict found its value, that it was unjustly taken by plaintiff and that defendant was entitled to a return thereof, and that defendant was damaged in a certain sum by reason of the taking and detention. *Held,* that the judgment should have been in the alternative, under sec. 2888, R. S., for a return of the property, or for its value in case a return could not be had, with damages. *Baxter v. Berg,* 399
3. Where property replevied from a sheriff exceeds in value the amount of the execution under which it was taken, and the plaintiff is the owner of the property except as against the execution creditor, the alternative judgment for the defendant, in case a return of the property cannot be had, should be for the amount of his special interest only. *Bleiler v. Moore,* 438

RES ADJUDICATA. See ESTATES OF DECEDENTS, 7.

RESCISSION. See SALE OF CHATTELS, 2. VENDOR AND PURCHASER, 1, 2.

RETROACTIVE STATUTE. See PUBLIC LANDS, 5.

REVERSAL on appeal. See ATTACHMENT, 1. JUDGMENT, *Reversal.*

RIGHT OF WAY.

The owner of land subject to a right of way may maintain a gate across the way, if such gate is necessary to the reasonable use and enjoyment of his land and does not unreasonably interfere with the use of the way. *Wille v. Bartz,* 424

ROADS AND STREETS. See HIGHWAYS. MUNICIPAL CORPORATIONS, 9–16, 19. TOWNS.

RULES OF COURT.
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Circuit Court Rule IV, sec. 9 (Entry of order), 576.
County Court Rule (1879) XVII, sec. 6 (Extra compensation to executor), 123, 130.

SALE OF CHATTELS.

See AGENCY, 5. VENDOR AND PURCHASER, 6, 7.

1. In an action to recover the purchase price of a belt, the evidence is *held* to support a finding that a conditional sale of a feed cutter, horse-power, and belt had failed, and that by a subsequent arrangement between the parties the sale really made was of the feed cutter only. *Silvernail v. Rust,* 458

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2. As an inducement to the giving of an order for a soda-water fountain, the manufacturer's agent promised orally that he would not sell any fountain of that make to any one else on the same street, and the vendees relied on such promise, but the agent intended to break it and did break it. *Held*, that there was not such a fraud or false representation as would entitle the vendees to rescind or cancel the order. *Lee v. Simmons*, 65 Wis. 523, distinguished. *Tufts v. Weinfeld*, 647

3. The order being for a soda-water fountain to be manufactured, and having been countermanded, the vendor had no right to go on and manufacture the fountain for the purpose of charging the full contract price or to increase the damages for the breach. *Ibid.*

4. The damages recoverable in such case are the profits which the vendor would have realized had both parties performed the contract. *Ibid.*

5. Although, after the order had been countermanded, the vendor completed the fountain and tendered it to the vendees and then brought his action for the whole contract price, yet, the profits which he would have realized having been proven without objection, he might recover them in said action, and the complaint will be deemed to have been amended accordingly. *Ibid.*

SALE OF LANDS. See AGENCY, 1–4. CONTRACTS, 2, 8. FALSE REPRESENTATIONS, 1. FRAUD. LIENS, 3. PARTNERSHIP. PUBLIC LANDS. TAX TITLES. VENDOR AND PURCHASER.

SCHOOL LANDS. See PUBLIC LANDS.

SCHOOLS. See NORMAL SCHOOLS.

SEWERS. See MUNICIPAL CORPORATIONS, 7, 8.

SHERIFF. See DEBTOR AND CREDITOR, 3. EXECUTIONS, 1. REPLEVIN, 3.

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STIPULATION: Setting aside. See TRIAL BY JURY.

STREET RAILWAYS.

1. Plaintiff's claim being that the wheels of defendant street car in some way caught and crushed his elbow but did not run over his arm, it was not error to exclude expert testimony on behalf of the defendant as to what would have been the effect upon the arm if the car had run over it. If relevant, it was not the subject of expert testimony. *McCoy v. Milwaukee St. R. Co.* 56

2. It being claimed that the injury was caused by the negligence of the car driver, evidence, elicited on his cross-examination, that it was part of his duty to see that passengers put their fares in the box, and that sometimes in attending to that duty he had to turn around so as to face the car, was competent to show that his attention was liable to be diverted, even though it could not be shown with certainty what was the precise situation at the time of the accident. *Ibid.*

3. Plaintiff was injured, while attempting to cross defendant's street railway tracks, by the collision of an electric car with the phaeton

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in which she was riding. Upon the evidence (stated in the opinion) it is *held* that the questions of defendant's negligence and of plaintiff's contributory negligence were for the jury. *Little v. Superior R. T. R. Co.* 402

4. An instruction that "although plaintiff might not have exercised ordinary care in turning upon the track, still if the motorman saw her so in danger and unconscious of peril, and thereupon failed to exercise *ordinary care* to avoid the collision, and such want of ordinary care was the proximate cause of the injury, plaintiff should recover," is criticised. *Ibid.*

STREETS. See MUNICIPAL CORPORATIONS, 7-16, 19.

SUPREME COURT. See APPEAL.

SURETYSHIP. See NEGOTIABLE INSTRUMENTS, 1.

SURRENDER of interest in land. See VENDOR AND PURCHASER, 5.

TAXATION.

See PUBLICATION OF LEGAL NOTICES, 1. TAX TITLES.

In an action for the penalty prescribed by sec. 1, ch. 381, Laws of 1889, for intentionally making a false statement of property to the board of review for the purpose of avoiding payment of the just taxes thereon, a verdict finding "the defendant guilty, not crimanly, but negligently, in not returning to the board of review in the sum of $4.125, making the penalty $410," is *held* to pass sufficiently upon all the issues, and to be, in effect, a verdict for the defendant. *State v. Wolfrum,* 481

TAXATION of costs. See COSTS.

TAX TITLES.

See MARRIED WOMEN. WILLS, 2.

1. A tax deed in the form prescribed by sec. 1178, R. S., reciting that several blocks (described therein and with the amount set opposite to each) "were, for the nonpayment of taxes, sold . . . for the sum of $80 *in the whole*, which was the amount of taxes assessed and due and unpaid on said blocks," etc., does not show that said blocks were sold for a gross sum,—the words "in the whole" meaning merely that the amounts, as stated in the certificate, opposite each block, and for which they were sold, aggregated $80. *Hotson v. Wetherby,* 324

2. A tax deed of several tracts is, without any recital on the subject, presumptive evidence that they were sold separately as prescribed by law. *Ibid.*

3. It is not necessary to the validity of a tax deed that it should be recorded within the time limited by sec. 1182, R. S., for the issuance thereof. *Ibid.*

4. Under sec. 1, ch. 112, Laws of 1867 (sec. 1182, R. S.), providing that the limitation of six years for the issuance of deeds on tax certificates shall not apply to certificates issued to or held by counties, or to their assigns, until six years from the date of their assignment by the county, the time limited does not begin to run from the mere acceptance by the county of a bid for the certificates, not amounting to an assignment *in præsenti.* *Ibid.*

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5. Sec. 32, ch. 22, Laws of 1859 (sec. 1187, R. S.), providing that no action by the grantee in a tax deed to recover possession of the land should be maintained unless brought within three years after the recording of the deed, cannot be construed as prescribing any limitation in respect to tax certificates or the issuance of deeds thereon. *Ibid.*

6. In the absence of any statutory bar upon the issuance of a deed upon a tax certificate, or of any presumption of payment or redemption which might arise after the lapse of twenty years or after long-continued adverse possession, the evidence of abandonment or laches must be clear and decisive to have the effect of depriving the holder of the certificate of his right to a deed thereon. *Ibid.*

7. Where the description of the land affected by a tax deed was not entered upon the general index at the time the deed was spread upon the record, the subsequent insertion, in the place for such description, of the words "See record" makes the record complete and operative from the time of such insertion, if the index correctly refers to the volume and page where the deed is recorded at length. *Ibid.*

8. Under sec. 1188, R. S., a tax deed, fair on its face and properly recorded more than three years before the commencement of the action, cannot be impeached by evidence of defects or irregularities in the tax proceedings prior to its execution. *Ibid.*

9. In ejectment a finding that a tax deed executed in 1886, upon which plaintiff's title rests, was founded on a certificate of the sale of the land for the taxes of 1883, does not sustain a judgment for the plaintiff, since it shows that the deed conveys no title because issued within three years from the date of the sale, which could not have taken place earlier than May, 1884. *Safford v. Conan*, 354

10. In the absence of a bill of exceptions, this court cannot treat the statement as to the taxes of 1883 as a clerical error, and assume that the taxes of 1882 were meant; nor, if the statement is contradicted by the other findings, can it determine which finding is correct. *Ibid.*

11. Redemption receipts not countersigned by the county treasurer as required by sec. 1167, R. S., are not evidence of redemption and, being void upon their face, do not constitute a cloud upon title which equity will interfere to remove, even though they might be used to corroborate evidence of actual payment of the proper sums for redemption. *Brown v. Cohn*, 627

TEACHERS: Removal. See NORMAL SCHOOLS.

TELEPHONE COMPANIES. See NEGLIGENCE, 3–5.

TITLE to land. See APPEAL, 2. EJECTMENT. EVIDENCE, 2–4. INJUNCTION. POWER OF ATTORNEY. TAX TITLES. VENDOR AND PURCHASER.

TOWNS.

The removal of a fence by the supervisors and pathmaster of a town, on the claim that it encroaches upon a highway, is an act within the scope of their general official duties, and, if unlawful, the town is liable therefor; and where such removal is threatened, the town is a proper party to an action to prevent it. *Nicolai v. Vernon*, 551

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TRADE-MARKS.

1. The word "Marvel," used in a flour brand to designate the output of a certain mill, is a valid trade-mark. *Listman Mill Co. v. William Listman Milling Co.* 334

2. The trade-mark "Marvel," which had been used by a firm to designate the output of its flour mill, was registered in the name of L. one of the partners, who "originated" it. Its use was continued by the firm and by a corporation which succeeded the firm in the operation of the mill, and also by the plaintiff corporation, which purchased the site and erected a new mill after the burning of the old one. L. owned practically all the stock of the former corporation when the business was transferred to the plaintiff, and was largely interested in the latter and was its general manager for four years. He then sold his interest in the plaintiff, and became the president and general manager of the defendant corporation, which thereafter used the trade-mark "Marvel" upon the product of its mill, situated in another city. *Held*, that although there had been no express transfer of the trade-mark, the exclusive right to its use had passed to the plaintiff. *Ibid.*

3. The use of the distinguishing feature of plaintiff's trade-mark in combination with others, constituting a trade-mark or brand so similar in appearance as probably to deceive customers or patrons of plaintiff's trade or business, will be restrained by injunction, although it is not shown that any one has in fact been deceived or that there has been intentional fraud. *Ibid.*

TRANSACTIONS with persons since deceased. See ATTACHMENT, 4.

TRESPASS. See HIGHWAYS, 4.

TRIAL BY JURY.

1. A stipulation waiving a trial by jury was entered into upon the supposition that the case would turn substantially or wholly upon questions of law. Afterwards it transpired that questions of fraud and forgery would be tried, in respect to which charges of perjury were suggested. *Held*, that it was not an abuse of discretion to relieve the plaintiff from the effect of the stipulation, the defendants not being placed thereby in any worse position than before the stipulation was made. *Brown v. Cohn.* 627

2. The fact that defendants may not be able to get a fair trial in the county where the action is pending, on account of the influence and standing of the plaintiff and his relatives and friends, is not a reason for refusing to set aside such a stipulation and denying to plaintiff the benefit of a jury trial. The provisions for change of venue must be held a proper protection to defendants. *Ibid.*

TRIAL, Place of. See CHANGE OF VENUE. CRIMINAL LAW, 4, 5. MILWAUKEE MUNICIPAL COURT. TRIAL BY JURY, 2.

TRUSTS AND TRUSTEES. See BANKS AND BANKING. FRAUD. INTEREST. WILLS.

USAGE. See MASTER AND SERVANT, 8. PUBLICATION OF LEGAL NOTICES, 3.

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VENDOR AND PURCHASER OF LAND.

See AGENCY, 1-4. CONTRACTS, 2, 3. FRAUD. LIENS, 3. PARTNERSHIP.

1. The purchaser of a farm in a part of the country with which he was unacquainted had a right to rely upon representations in a plat exhibited to him by agents of the vendor, purporting to show the location, quantity, and nature of the land, although he afterwards made a hasty inspection of the farm in company with such agents, and although they employed no artifice to prevent a full investigation, where such investigation was made at an unfavorable season and the falsity of the representations in the plat were not obviously discoverable. *Porter v. Beattie,* 22

2. The agents having known, before the sale was consummated, the falsity of the representations in the plat and that the purchaser was relying thereon, and not having informed him of the facts, such representations were fraudulent, even if made in the first instance through inadvertence or mistake. *Ibid.*

3. A testator devised lands to the city of Superior before it was incorporated. Some of the heirs quitclaimed their interests therein, for $100 each, to the defendant, a son-in-law of their uncle, who was to contest the validity of the devise, and if successful was to pay each $300 more. Had their title been unquestioned their interests would have been worth much more, but were then not marketable. The devise was afterwards adjudged void. It appearing that the grantors were not induced to make the deed by any misrepresentation, concealment, or undue influence, that at the time they were anxious to sell, and that they knew the state of the title as well as the defendant did, and knew, also, that he depended entirely upon the contingency of success in the proposed legal proceedings to secure any interest in the lands through their deed, it is *held* that they are not entitled to have the deed set aside on the ground of fraud. *Allen v. Brooks,* 265

4. A written instrument by which a land company acknowledged the receipt of a sum of money and gave the person paying it permission to enter upon a certain lot in its town site and to build thereon within a definite period, and agreed to sell the lot to him, upon the completion of the building, at a fixed price, and to apply thereon the sum already paid, and to convey the lot to him, taking back security for the deferred payments, is *held* to cover the entire contract of sale on the part of the company; and, there having been no fraud or misrepresentation of existing facts, an antecedent or contemporaneous oral agreement by the company, in consideration of such purchase, to build and maintain a large city upon said site, etc., could not be shown. *Custeau v. St. Louis Land Imp. Co.* 311

5. The parties to a contract for the purchase of land mutually agreed that the deal should be considered off, and the contract was accordingly surrendered to the purchaser, and the vendor agreed also to surrender to him a check given for a part of the purchase price and which had been sent away for collection, and that in the mean time payment thereof be stopped. Payment of the check was stopped accordingly, and it was subsequently returned to the vendor by the bank to which he had delivered it for collection and which had credited him with the amount thereof, upon his giving his own check to make good the account. Afterwards the vendor delivered the check to an agent who had negotiated the contract for the sale of the land, but who paid no consideration for such delivery. *Held,* that there had been a valid surrender of the purchaser's

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interest in the land, and a cancellation of his check, and that the delivery of the latter to the agent did not make it an existing obligation. *Hutchins v. Da Costa,* 371

6. A contract by a man and his wife to sell and convey "their homestead farm, being seventeen acres in the town of P. and fifty-four and one-half acres in the town of G., together with all the farming implements," etc., is *held* to be a contract for the sale of a known farm and not of a specified quantity of land, the mention of the number of acres being for the purpose of description only. *Hackbarth v. Wollner,* 476

7. No time being specified in such contract for delivery of the personal property, a mere failure of the vendors to deliver it is not a breach of the contract if the vendee has never taken possession of the farm nor demanded possession thereof or of the personal property. *Ibid.*

8. Specific performance of an oral contract to convey land will not be enforced where the plaintiff's testimony as to the price to be paid is contradicted by that of defendant and is not corroborated by any other evidence. *Eckel v. Bostwick,* 493

9. The parol contract in such case being void, so that the plaintiff could have no remedy on it at law, a judgment dismissing his complaint on the merits is proper, and should not be modified so as to dismiss the complaint without prejudice. *Richards v. Allis,* 82 Wis. 509, distinguished. *Ibid.*

10. The evidence in this case is *held* to show that a conveyance by an heir of his interest in the estate of his ancestor, made in ignorance of the value of lands devised by the ancestor for public parks and of an arrangement for contesting the validity of the devise, was induced by concealment, deceit, and misrepresentation, and should be set aside. *Dean v. Brooks,* 667

VENUE. See CHANGE OF VENUE. CRIMINAL LAW, 4, 5. MILWAUKEE MUNICIPAL COURT. TRIAL BY JURY, 2.

VERDICT.

See TAXATION.

1. Questions submitted for a special verdict should be limited to the material issuable facts, as distinguished from mere evidence. *Ohlweiler v. Lohmann,* 75

2. The question whether the defendant was guilty of any negligence which was the proximate cause of the injury being submitted to the jury for a special verdict, a question requiring the jury to state in what that negligence consisted was properly refused as calling for mere evidential facts. *McCoy v. Milwaukee St. R. Co.* 56

3. A question as to whether the defendant in the exercise of ordinary care could have avoided the injury was also properly refused as being merely a repetition of the question first mentioned. *Ibid.*

VILLAGES. See MUNICIPAL CORPORATIONS, 11, 20.

VOLUNTARY ASSIGNMENT.

See BANKS AND BANKING.

1. Partners assigned for the benefit of creditors all their property except such as might by law be exempt from seizure on execution or attachment. All the property was delivered to the assignee, and was

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included in the inventory without mention of exemptions, and no claims of exemptions were made until nearly a month later, after the assignee had expended labor and money upon the property in caring for and insuring it and getting it ready to be sold. *Held*, a waiver of the right to exemptions from the partnership property. *Lamont v. Wootton*, 107

2. Under sec. 16, ch. 385, Laws of 1889, a creditor whose name has been put by the assignor on the list of creditors filed may appeal from an order of the court allowing to assignors the exemptions claimed by them. *Lamont v. Hibbard, Spencer, Bartlett & Co.* 109

WAIVER.
Of right to return machine bought on approval. See AGENCY, 5.
Of objection that plea was withdrawn, etc. See CRIMINAL LAW, 3.
Of objection to counsel for state. See CRIMINAL LAW, 6.
Of objection to instructions. See CRIMINAL LAW, 31. MUNICIPAL CORPORATIONS, 15.
Of right to damages. See FALSE REPRESENTATIONS, 4.
Of right to recover specific property. See FRAUD, 3.
Of right to exemptions. See VOLUNTARY ASSIGNMENT, 1.

WARRANT of arrest: Sufficiency. See CRIMINAL LAW, 25. PROHIBITION.

WATER COMPANY: Franchises: Regulation of rates. See MUNICIPAL CORPORATIONS, 20–24.

WAUSAU. See MUNICIPAL CORPORATIONS, 18.

WILLS.

See ESTATES OF DECEDENTS, 3, 6–8.

1. Under sec. 2295, R. S., where a foreign will devised lands in this state to the executrix in trust for the payment of debts, the recording of a duly authenticated copy of such will and of the probate thereof, in the office of the register of deeds of the county in which the lands are situated, passes the title to the trustee as effectually as if the will had been probated in the proper court in this state. *Wells, Fargo & Co. v. Walsh*, 534

2. In such a case, where the executrix and trustee, in fraud of the creditors, has allowed the lands to be sold for taxes, and has procured the issuance of a tax deed to herself, which she claims to be a good title, a creditor may maintain an action in the circuit court to enforce the trust, notwithstanding the fact that by proceeding in the county court to have the will probated and the estate administered he might obtain some part of the relief sought; and all the creditors may be made parties to such action. *Ibid.*

[3. Whether under sec. 3793, R. S., if there were no debts due to parties residing in this state, a foreign creditor could, in the county court, proceed further than the mere probate of the will, not determined.] *Ibid.*

WITHDRAWAL.
Of names from petition. See COUNTIES, 2.
Of school lands from sale. See PUBLIC LANDS, 3–5.

WITNESSES: Competency and credibility. See ATTACHMENT, 4. CRIMINAL LAW, 19, 32, 33. EVIDENCE, 5. INSTRUCTIONS TO JURY, 1, 5–8. MASTER AND SERVANT, 8. PHYSICIANS AND SURGEONS, 1.

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WORDS AND PHRASES.
Act of God. See NEGLIGENCE, 5.
Any lawful business or purpose whatever, in statute. See CORPORATIONS, 3.
Any claim or demand of whatsoever nature, in statute. See MUNICIPAL CORPORATIONS, 17.
Appointed, in constitution. See MUNICIPAL CORPORATIONS, 2.
At pleasure, in statute. See NORMAL SCHOOLS, 1.
Authorized by such charter, in statute. See MUNICIPAL CORPORATIONS, 7.
Building, in statute. See CRIMINAL LAW, 1.
County road, in statute. See HIGHWAYS, 4.
Describing generally the insufficiency, in statute. See MUNICIPAL CORPORATIONS, 14.
Dwelling house, in statute. See CRIMINAL LAW, 1.
Engaged in the commission of any felony, in statute. See CRIMINAL LAW, 18.
Feloniously, in information. See CRIMINAL LAW, 29.
Filed, in statute. See LIENS, 2.
Folio, in statute. See PUBLICATION OF LEGAL NOTICES, 3.
Immediately, in accident policy. See INSURANCE, 1.
Sold for $80 *in the whole*, in deed. See TAX TITLES, 1.
As the county court shall *judge reasonable*, in statute. See ESTATES OF DECEDENTS, 5.
Legal notice, in statute. See PUBLICATION OF LEGAL NOTICES, 2.
Lot or tract, in statute. See PUBLICATION OF LEGAL NOTICES, 1.
Net personal estate, in statute. See ESTATES OF DECEDENTS, 6.
Night time, in statute. See CRIMINAL LAW, 16.
No action in tort, in statute. See MUNICIPAL CORPORATIONS, 18.
On deposit and for safe keeping, in information. See CRIMINAL LAW, 26.
Open lewdness, in statute. See CRIMINAL LAW, 20.
Ordinary care. See NEGLIGENCE, 8.
Owner, in statute. See LIENS, 3.
Real property, in statute. See LIENS, 3.
Reasonable time. See NEGOTIABLE INSTRUMENTS, 6–8.
Unlawfully. See CRIMINAL LAW, 29.
Unsound, in notice of injury. See MUNICIPAL CORPORATIONS, 14.
Unusual difficulty, in statute. See ESTATES OF DECEDENTS, 3.
Withhold from sale, in constitution. See PUBLIC LANDS, 3.

WRIT.
Of attachment. See ATTACHMENT.
Of execution. See EXECUTIONS.
Of extradition. See CRIMINAL LAW, 2.
Of *habeas corpus.* See CRIMINAL LAW, 13.
Of injunction. See INJUNCTION.
Of *mandamus.* See COUNTIES, 2, 4.
Of prohibition. See PROHIBITION.
Of replevin. See REPLEVIN.

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